



U.S. Department
of Transportation

**Federal Transit
Administration**

PROPOSED CIRCULAR

FTA C 4220.1F

DATE

Subject: THIRD PARTY CONTRACTING GUIDANCE

1. PURPOSE. This circular provides contracting guidance for the recipient of financial assistance awarded by the Federal Transit Administration (FTA) when using those funds to finance their procurements (third party contracts). This revision incorporates the new procurement provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), and includes the most current available guidance for the Federal public transportation program as of the date of publication.
2. CANCELLATION. This circular, when final, will cancel FTA Circular 4220.1E, "Third Party Contracting Requirements," dated 06-19-03.
3. AUTHORITY.

Federal Transit Laws, Title 49, United States Code, Chapter 53.

4. WAIVER. FTA reserves the right to waive any provision of this circular to the extent permitted by Federal law or regulation.

FEDERAL REGISTER NOTICE. (This will be inserted when the final circular is adopted)...

5. AMENDMENTS TO THE CIRCULAR. FTA reserves the right to make changes to this circular in the future to update references to requirements contained in other revised or new guidance and regulations that undergo notice and comment procedures, without further notice and comment on this circular.
6. ACCESSIBLE FORMATS. This document is available in accessible formats upon request. Paper copies of this circular as well as information regarding these accessible formats may be obtained by calling FTA's Administrative Services Help Desk, at 202-366-4865. The Federal Relay Service (FRS) is a Government system to support individuals with hearing impairment. An operator trained to use the TTY System is available to assist people who are hearing impaired. The FRS Toll Free Access Number is 800-877-8339.

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THIRD PARTY CONTRACTING GUIDANCE

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CHAPTER I

INTRODUCTION AND ROLE OF THE FEDERAL TRANSIT ADMINISTRATION

1. **THE FEDERAL TRANSIT ADMINISTRATION (FTA)**. FTA is one of ten operating administrations within the U.S. Department of Transportation (DOT). Headed by an Administrator who is appointed by the President of the United States, FTA functions through a Washington, DC, headquarters office, ten regional offices and five metropolitan offices that assist public transportation agencies in all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa.

Public transportation encompasses transportation by buses, subways, light rail, commuter rail, monorail, passenger ferry boats, trolleys, inclined railways, people movers, and vans. Public transportation can be either fixed-route or demand-response service. The Federal Government, through FTA, provides financial assistance to develop new public transportation systems and improve, maintain, and operate existing systems. FTA oversees thousands of federally-assisted projects to hundreds of State and local public transportation providers, primarily through its ten regional offices. Each FTA recipient is responsible for managing its programs and projects in accordance with Federal requirements, and FTA is responsible for ensuring that recipients follow Federal statutory and administrative requirements.

2. **AUTHORIZING LEGISLATION**. Most Federal transit laws are codified at 49 U. S. C. Chapter 53. Authorizing legislation is substantive legislation enacted by Congress that establishes or continues the legal operation of a Federal program or agency. Congress has amended FTA's authorizing legislation every four to six years. FTA's most recent authorizing legislation is the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, signed into law August 10, 2005. SAFETEA-LU authorizes FTA programs from Federal Fiscal Year (FY) 2006 through Fiscal Year 2009. Changes have been added to this circular to reflect the SAFETEA-LU changes to Federal transit law and to reflect changes required by other laws that have become effective since the circular was last published in 2003.
3. **HOW TO CONTACT FTA**. FTA's regional and metropolitan offices are responsible for the provision of financial assistance to FTA recipients and oversight of implementation for most FTA programs. Certain programs are the responsibility of FTA headquarters. Inquiries should be directed to either the regional or metropolitan office responsible for the geographic area in which you are located. See, Appendix B for additional information.

For further information, visit the FTA website: <http://www.fta.dot.gov>, or contact FTA Headquarters at the following address and phone number:

Federal Transit Administration Office of Communication and Congressional Affairs
1200 New Jersey Avenue SE

Washington, DC 20590
Phone: 202-366-4043
Fax: 202-366-3472

4. BACKGROUND. Because FTA makes grants and enters into cooperative agreements awarding such a substantial amount of Federal assistance to support public transportation, FTA has been charged by Federal laws and regulations to assure that those Federal assistance funds it provides to its recipients are used prudently in a manner consistent with all applicable Federal requirements. FTA's enabling legislation contains several provisions pertaining to procurements undertaken by FTA recipients. In addition, certain government-wide Federal principles must be applied to assure fair and economical procurements when Federal assistance is expended.
5. DEFINITIONS. All definitions in 49 U.S.C. Section 5302 are applicable to this circular. The following additional definitions are provided:
 - a. Approval, Authorization, Concurrence, Waiver means a conscious written statement (transmitted in typewritten hard copy or electronically) of a Federal Government official authorized to permit the recipient to take or omit an action required by the Grant Agreement or Cooperative Agreement for the Project, Master Agreement, or this circular, which action may not be taken or omitted without such permission. Except to the extent that FTA determines otherwise in writing, such approval, authorization, concurrence, or waiver permitting the performance or omission of a specific action does not constitute permission to perform or omit other similar actions. An oral permission or interpretation has no legal force or effect.
 - b. Best Value describes a competitive, negotiated procurement in which the recipient reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price. Best Value procurement enables the recipient to purchase technical superiority even if it means paying a premium price. A "premium" is the difference between the price of the lowest priced proposal and the one that the recipient believes offers the best value. In accordance with 49 U.S.C. Section 5325(c), a recipient may award a contract to other than the lowest bidder if the award furthers an objective consistent with the purposes of 49 U.S.C. Chapter 53, including improved long-term operating efficiency and lower long-term costs. To achieve best value in the context of acquisitions for public transportation purposes, evaluation factors may include technical design, technical approach, quality of proposed personnel, past performance, and/or management plan. Best Value also means the expected outcome of an acquisition that, in the recipient's estimation, provides the recipient the greatest overall benefit in response to the requirement. This definition is intended neither to limit nor to dictate qualitative measures recipients may employ, except that they must be in support of the purposes of the Federal public transportation program.
 - c. Common Grant Rule, for purposes of this circular, means:

- (1) In the case of Federal grants and cooperative agreements with governmental recipients of Federal assistance including Indian tribal governments, DOT regulations, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 CFR Part 18.
 - (2) In the case of Federal grants and cooperative agreements with non-governmental recipients of Federal assistance, DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR Part 19.
- d. Constructive Change means an act or omission by the recipient, which in fact causes a change in the contract work.
 - e. Cooperative Agreement means an instrument by which FTA awards Federal assistance to a specific recipient to support a particular project in which FTA takes an active role or retains substantial control, as set forth in 31 U.S.C. Section 6305.
 - f. Design-Bid-Build Project means a construction project under which a recipient commissions an architect or engineer to prepare drawings and specifications under a design services contract, and separately contracts for at risk construction, by engaging the services of a contractor through sealed bidding or competitive negotiations to complete delivery of the project.
 - g. Design-Build Project as defined in 49 U.S.C. Section 5325(d)(1) means (1) a project under which a recipient enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system, that meets specific performance criteria; and (2) may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment.
 - h. Electronic Commerce (E-Commerce) consists of electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, electronic signatures, and electronic data interchange.
 - i. FTA means the Federal Transit Administration.
 - j. Governmental Recipient means a recipient that must comply with the Common Grant Rule at 49 CFR Part 18. This includes a State or local government or a federally recognized Indian tribal government.
 - (1) State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency

under United States Housing Act of 1937. Nor does the term include a State public institution of higher education.

- (2) Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government. This term does not include a local public institution of higher education.
 - (3) Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.
- k. Grant means the instrument by which FTA awards Federal assistance to a specific recipient to support a particular project in which FTA does not take an active role or retain substantial control, as set forth in 31 U.S.C. Section 6304.
 - l. Master Agreement means the FTA official document containing substantially all FTA and other cross-cutting Federal requirements applicable to the FTA recipient and its project. The Master Agreement is generally revised annually. The Master Agreement is incorporated by reference and made part of each FTA grant, cooperative agreement, and amendment thereto.
 - m. Non-Governmental Recipient means a recipient that must comply with the Common Grant Rule at 49 CFR Part 19. These entities include public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. FTA reserves the right to apply the requirements of 49 CFR Part 19 to commercial organizations, foreign or international organizations (such as agencies of the United Nations), and individuals. Government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers are not subject to the requirements of 49 CFR Part 19.
 - n. Property, as used in this circular, encompasses real property, equipment, supplies, other expendable property, intellectual property, and intangible property.
 - o. Recipient means the public or private entity to which a grant or cooperative agreement is awarded by FTA. The recipient is the entire legal entity even if only a particular

component of the entity is designated in the assistance award document. The term “recipient” includes “grantee,” which is a “recipient” of Federal grant assistance.

For the purposes of this circular, “recipient” also includes any subrecipient or subgrantee of the recipient. Furthermore, a recipient is responsible for assuring that each of its subrecipients complies with the requirements and standards of this circular, and that each of its subrecipients is aware of requirements imposed upon them by Federal statutes and regulations.

- p. Revenue Contract means a contract of the recipient or subrecipient the primary purpose of which is either to produce revenues in connection with a public transportation related activity, or to create business opportunities involving the use of an FTA assisted asset.
 - q. State means a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands or any agency or instrumentality of a State exclusive of local governments. “State” does not include any public and Indian housing agency under the United States Housing Act of 1937.
 - r. Third Party Contract refers to any purchase order or contract awarded by a recipient to a vendor or contractor using Federal financial assistance awarded by FTA; a third party contract also includes purchases by credit card.
6. FTA’S ROLE. FTA’s role in third party procurements reflects the principles of Executive Order No. 13132, “Federalism,” 08–04–1999, 5 U.S.C. Section 601 note. The Executive Order directs Federal agencies to refrain from substituting their judgment for that of their State recipients unless the matter is primarily a Federal concern and to defer, to the maximum extent feasible, to the States to establish standards rather than setting national standards.

To ensure compliance with Federal procurement requirements, FTA will continue to provide guidance and technical assistance to its recipients consistent with its Federal oversight responsibilities.

- a. Reliance on the Recipient’s Self-Certification. Recognizing that most FTA recipients have experience with the third party contracting requirements of the Federal regulations (49 CFR Parts 18 and 19), FTA will rely primarily on the recipient’s “self-certification” (usually provided annually in the first quarter of the Federal fiscal year) that its procurement system meets FTA requirements and that the recipient has the technical capacity to comply with Federal procurement requirements. Each recipient is asked to “self-certify” as part of the Annual Certifications and Assurances.

To preclude unnecessary delay in recipient procurements, FTA does not, as a general rule, conduct pre-award reviews of third party contracts or contract specifications as envisioned in the Common Grant Rules, 49 CFR Section 18.36(g)(2) and 49 CFR

Section 19.44(e). Instead, FTA relies heavily on the recipient's self-certification of its procurement system.

FTA will, however, monitor compliance with this circular as part of its routine oversight responsibilities. If FTA becomes aware of circumstances that might invalidate a recipient's self-certification, FTA will investigate and recommend appropriate measures to correct whatever deficiency may exist.

- b. Third Party Contract Reviews. Although authorized by the Common Grant Rules to conduct pre-award reviews, FTA relies on the validity of each recipient's self-certification rather than on a pre-award review of third party contracts. FTA will rely on periodic, post-award reviews to ensure that the recipient complies with Federal requirements and standards. Should a recipient fail to self-certify its procurement system, however, FTA reserves the right to conduct pre-award reviews as provided for in the Common Grant Rules. A recipient is still free to request FTA's pre-award review of its procurements as part of FTA's technical assistance program. Conversely, if FTA requests to review the record of a particular procurement, a recipient must make its procurement documents available for FTA's pre-award (or post-award) review.
- c. Procurement System Reviews. In accordance with 49 U.S.C. Section 5307(i), a recipient may request the Secretary to approve its procurement system, and FTA may provide that approval. FTA is required by 49 U.S.C. Section 5307(h) to perform reviews and evaluations of the Urbanized Area Formula Program and to perform a full review and evaluation of the performance of each recipient in carrying out Federal assistance through FTA's Urbanized Area Formula Programs with specific reference to their compliance with statutory and administrative requirements.

Accordingly, FTA will perform procurement system reviews as part of its on-going oversight responsibility and will perform procurement system reviews for Urbanized Area Formula Program recipients that self-certify their procurement systems. FTA may recommend "best practices" in order to assist the recipient in improving its procurement practices. In such cases, FTA will identify such recommendations as "advisory." For more information, see FTA's "Procurement Reviews," guidance at the FTA website http://www.fta.dot.gov/funding/oversight/grants_financing_100.html.

- d. Audits. FTA may perform, contract for, or instruct the recipient to obtain specific audits of particular third party contracts to ascertain that payments were made in conformance with the terms of the contract, or for other purposes.
- e. Training and Technical Assistance. FTA provides procurement training and technical assistance at both regional and national levels by offering various instructional courses, by conducting regional technical assistance conferences, and by providing assistance by a contractor on an as needed basis.
- f. FTA Master Agreement. FTA's grants and cooperative agreements incorporate terms and conditions referred to as the "Master Agreement." This document lists many FTA,

and other crosscutting Federal requirements applicable to the FTA recipient. Many of these requirements are related to third party procurements.

- g. FTA “Best Practices Procurement Manual.” FTA provides written procurement guidance to recipients in its “Best Practices Procurement Manual.” Although the manual can be a good resource for the recipient to use in conducting FTA assisted procurements, it is only a guidance document and is not the source of any FTA requirements. As such, reviewers should not refer to the manual when describing FTA requirements. Moreover, while FTA does revise and update the manual periodically, FTA cautions each recipient that relying solely on the manual may not ensure that all applicable FTA requirements will be met.
- h. The FTA Third Party Procurement HelpLine. This Help Line is another resource through which you may submit your questions on FTA’s third party acquisition policies and practices. It can be accessed at www.fta.dot.gov/funding/grants_financing_6036.html
- i. FTA Offices. You may also contact your FTA Regional or Metropolitan Office for assistance, or FTA’s Office of Administration for assistance . A list of the Regional and Metropolitan Offices can be found in Appendix B of this document.

CHAPTER II

APPLICABILITY

1. APPLICABILITY. Except to the extent that FTA determines otherwise in writing, the guidance within this circular applies to each Federal Transit Administration (FTA) recipient of Federal assistance (including each grantee and each recipient of Federal assistance under cooperative agreements) and each subrecipient (including each subgrantee) that enters into contracts with other parties under FTA assistance programs. As for “other agreements” authorized by 49 U.S.C. Section 5312(a) for research, development, demonstration, and deployment projects and 49 U.S.C. Section 5312(b) for joint partnership projects for the deployment of public transportation innovation, the principles of the circular may be used as an initial starting point from which to consider requirements and other provisions that should be adopted, and other requirements that should be modified or waived to achieve FTA’s and the recipient’s objectives.

To the extent that the circular restates requirements of Federal statutes or regulations, however, those statutory and regulatory requirements cannot be waived except as permitted therein. With a few exceptions listed below, this circular applies whenever Federal assistance is used to support a recipient’s procurements. (Within this circular, FTA uses the term “third party contract” to refer to the recipient’s contracts financed with Federal assistance funds). Neither third party contractors nor third party subcontractors are “recipients” for purposes of this circular. Consequently, third party contractors are not directly covered by this circular, the Common Grant Rules at 49 CFR Parts 18 and 19, and FTA’s “Best Practices Procurement Manual” in awarding their subcontracts. However, each third party contractor and subcontractor is required to comply with the clauses in its prime contracts with a recipient, including requirements to extend those clauses to its subcontractors at the lowest tier required. For that reason, this circular, the Common Grant Rules at 49 CFR Parts 18 and 19, and FTA’s “Best Practices Procurement Manual” do provide useful information to a third party contractor about the constraints under which a recipient may enter into a third party contract.

- a. Categories of Recipients. The extent to which the provisions of this circular apply to a recipient depends on whether the recipient is a State or other than a State.
 - (1) States. When procuring property and services under a grant or cooperative agreement, a State will follow the same procurement policies and procedures that it uses for its acquisitions that are not financed with Federal funds. States must, at a minimum, comply with the statutorily-mandated requirements of this circular on contract term limitation for revenue vehicle purchases, competition, prohibitions against geographic preferences, and procurement of architectural and engineering services and ensure that every purchase order and contract executed by it using Federal funds includes all clauses required by Federal statutes and their implementing regulations.

- (a) Governmental Subrecipients of the State. FTA takes the position that each State and its governmental subrecipients may utilize State procurement procedures for their third party contracts and that only the portions of this circular applicable to the State will apply to procurements by the State's governmental subrecipients.
 - (b) Private Non-profit Subrecipients of the State. In contrast, a private non-profit subrecipient of a State is required to comply with applicable requirements of 49 CFR Part 19.
- (2) Other Recipients and Subrecipients. The provisions of this circular apply to third party contracts and subcontracts of all other FTA recipients and their subrecipients, including regional public transportation authorities.
- b. Categories of Third Party Contracts. Some variations in the applicability of the circular depend on the type of contract involved.
 - (1) Capital Contracts. The provisions of this circular apply to most third party capital contracts except as listed below:
 - (a) Contracts Financed Without Federal Funds. The provisions of this circular do not apply to a recipient's capital contracts that can be demonstrated to be wholly financed without FTA or other Federal funds even if those contracts are undertaken in support of FTA assisted capital projects.
 - (b) Art. Procurements of art are beyond the scope of this circular. The acquisition of art is addressed in FTA Circular 9400.1A, "Federal Transit Administration Design and Art in Transit Projects," dated 06-09-95. In addition, FTA's "Best Practices Procurement Manual" includes extensive non-binding guidance for applying FTA Circular 9400.1A and related provisions.
 - (c) Over-the-Road Buses. FTA determined that the provisions of this circular and the Common Grant Rules do not apply to FTA's Over-the-Road Bus Accessibility Program. Section 3038 of TEA-21, as amended by Section 3039 of SAFETEA-LU, 49 U.S.C. Section 5310 note established this program to provide private for-profit companies funding to support the incremental costs of wheelchair lift equipment and to provide the necessary training to implement the Department of Transportation's (DOT's) accessibility requirements for over-the-road buses. As a result, there is no discussion of the Common Grant Rules or this circular in FTA's annual notice of availability of funds for this program.
 - (d) Real Property. Procurements of real property are generally beyond the scope of this circular. Real property acquisition is addressed in DOT regulations, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs," 49 CFR Part 24, which set forth

protections for owners and lessees of real property to be acquired as part of an FTA assisted project. The procurement provisions of this circular, however, applicable to construction will apply to procurements of buildings and other structures that require construction, alteration, or repair.

- (2) Operations Contracts. FTA is reviewing its policies with respect to operations procurements undertaken by FTA recipients and their subrecipients.
 - (a) Operations Contracts Financed With FTA Assistance. The provisions of this circular apply to contracts in support of the recipient's operations financed with FTA assistance.
 - (b) Operations Contracts Financed Entirely Without FTA Assistance.
RESERVED. [FTA is reviewing its policies with respect to applicability of FTA procurement requirements for operations contracts that recipients and their subrecipients finance entirely without FTA assistance. Notwithstanding any other provision of this circular, a recipient that enters into third party contracts for operations or planning must comply with the requirements of DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 CFR Part 26, applicable to those contracts, regardless of the allocation of its FTA assistance to contracting or other purposes.]
- (3) Preventive Maintenance. Third party contracts for preventive maintenance are eligible for FTA capital assistance. This circular applies to a recipient's preventive maintenance contracts financed with FTA assistance. If a recipient uses its FTA assistance to support specific discrete preventive maintenance contracts, and if, through its accounting procedures, a recipient is able to allocate and trace all its capital preventive maintenance funds to discrete preventive maintenance contracts, only those specific discrete contracts are covered by the circular. If, however, the recipient applies its preventive maintenance funds as a percentage of its total maintenance costs, and the recipient is unable to allocate all of its capital maintenance funds to discrete preventive maintenance contracts, the circular applies to all the recipient's preventive maintenance contracts, even if specific operating contracts were financed wholly without FTA assistance.
- (4) Revenue Contracts. A revenue contract is a contract of the recipient or subrecipient in which the recipient or subrecipient provides access to public transportation assets either to produce revenues in connection with a public transportation related activity, or to create business opportunities with the use an FTA assisted property. FTA requires these contracts to be awarded utilizing competitive selection procedures and principles. FTA provides the recipient broad latitude in determining the extent and type of competition appropriate for a particular revenue contract.

FTA requires these contracts to be awarded using competitive selection procedures and principles, as necessary. For example, if more than one interested party is readily available, and the opportunity (such as advertising space) is limited and cannot accommodate most prospective parties, then the recipient is expected to make its selection through competition. If, however, only one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), but the recipient is willing and able to provide access to other parties that may develop an interest in using the asset, then competition would not be required because the opportunity to obtain access is open to all interested parties.

- (5) Joint Development. An emerging area that combines aspects of federally-funded construction and revenue contracting is that of joint development. The circular's requirements must apply to the federally-funded construction aspects of a joint development project, but the revenue contracting aspects can make for difficult procurement practice decisions. FTA will work with the recipient to craft approaches on a case-by-case basis that satisfy the statutory and regulatory requirements for competition while preserving the benefits of this innovative contracting strategy to the maximum possible extent.
- (6) Public Private Partnerships. As part of FTA's interest in fostering Public Private Partnerships (PPP), FTA is considering which procurement and other requirements may be modified to facilitate project implementation, including procurement requirements to protect the Federal interest that are redundant with private sector safeguards, incentives, and obligations. Among the types of contracting arrangements FTA may be reviewing include:
 - (a) Design-Build,
 - (b) Design-Build with a Warranty,
 - (c) Construction Manager at Risk,
 - (d) Design-Build Operate Maintain,
 - (e) Design-Build Finance Operate,
 - (f) Build Operate Transfer,
 - (g) Build Own Operate, and
 - (h) Full Delivery or Program Management.

A recipient seeking an exception from specific requirements of this circular should contact its Project Manager. FTA will work with the recipient to craft approaches on a case-by-case basis that satisfy the statutory and regulatory requirements for

competition while preserving the benefits of the innovative contracting strategy proposed to the maximum possible extent.

- (7) Transactions Involving Complex Financial Arrangements. Should a public transportation project involve the services of an “arranger” or similar facilitator, whose services will not be financed with Federal assistance, FTA encourages, but does not require, competition in the selection of that arranger. But when the arranger constructs a transaction that will involve federally-funded assets, FTA requires competition to the extent permissible in view of the limitations of securities regulations. These principles have been applied to leveraged leasing projects in which FTA has previously participated.
2. FEDERAL LAWS AND REGULATIONS. Each recipient and subrecipient must comply with applicable Federal statutes, including but not limited to Federal transit laws at 49 U.S.C. Chapter 53 and Federal regulations, which contain requirements applicable to FTA assisted procurements and recipients thereof.
 - a. Common Grant Rules. To the extent that their requirements have not been superseded by conflicting Federal law or regulations, the most comprehensive Federal regulations applicable to FTA’s Federal assistance programs (frequently referred to as the “Common Grant Rule”) are:
 - (1) Governmental Recipients. DOT regulations, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 CFR Part 18, which are applicable to governmental recipients (apart from institutions of higher education) and Indian tribes, and
 - (2) Non-Governmental Recipients. DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR Part 19, which are applicable to private non-profit entities, institutions of higher education and, within FTA’s discretion, to private for-profit organizations.
 - b. Federal Acquisition Regulation. The Federal Acquisition Regulation (FAR), 48 CFR Chapter 1, does not apply to federally-assisted procurements, absent Federal laws or regulations to the contrary. In the case of FTA programs, FAR cost principles apply to grants and cooperative agreements with private for-profit entities. In addition, audits of architectural and engineering services as defined at 49 U.S.C. Section 5325 must be carried out in accordance with FAR Part 31 requirements. Nevertheless, in the absence of other guidance, FAR standards can provide helpful guidelines provided the recipient’s circumstances are appropriate for application of the specific FAR standard under consideration.
 - c. Other Federal Requirements. In addition to the Common Grant Rules, each FTA recipient is required to comply with applicable Federal transit laws and implementing regulations not addressed in the Common Grant Rules, as well as other Federal cross

cutting statutes and regulations that impact what a recipient may acquire, and other conditions that impact such acquisitions. The latest edition of FTA's Master Agreement, typically issued at the beginning of each Federal fiscal year, includes a comprehensive list of Federal laws and regulations that may apply to a federally-assisted project. Each recipient and subrecipient may use its own procurement procedures, provided that its procurements conform to applicable Federal law and regulations.

3. STATE AND LOCAL LAWS AND REGULATIONS. The Common Grant Rule provides that recipients and subrecipients will use their own procurement procedures that reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal laws and regulations. If there is no State or local law addressing a particular aspect of procurement, Federal direct procurement principles can often (but not always) provide useful guidance.

In the event of a conflict between Federal and State or local requirements, the recipient should notify FTA expeditiously in writing. FTA will then work with the recipient to make appropriate arrangements to proceed with the project or, if unsuccessful, then terminate the Project.

CHAPTER III

THE RECIPIENT'S RESPONSIBILITIES

1. **WRITTEN STANDARDS OF CONDUCT.** The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.
 - a. **Personal Conflicts of Interest.** No employee, officer, agent, immediate family member, or board member of the recipient shall participate in the selection, award, or administration of a contract supported by Federal Transit Administration (FTA) funds if a conflict of interest, real or apparent, could be involved. Such a conflict would arise when any of the following has a financial or other interest in the firm selected for award:
 - (1) The employee, officer, agent, or board member,
 - (2) Any member of his/her immediate family,
 - (3) His or her partner, or
 - (4) An organization that employs, or is about to employ, any of the above.
 - b. **Gifts.** The recipient's officers, employees, agents, or Board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.
 - c. **Violations.** To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient's officers, employees, or agents, or by contractors or their agents.
2. **SELF-CERTIFICATION.** FTA expects each recipient to self-certify that its procurement system complies with Federal requirements for any FTA assisted third party contracts the recipient undertakes and administers.
3. **PROCUREMENT CAPACITY.** As part of an FTA recipient's obligation to maintain adequate technical capacity to carry out its project and in compliance with the Common Grant Rules, the recipient's procurement capability must be adequate to undertake its procurements effectively and efficiently in accordance with applicable Federal requirements. The Common Grant Rules require the recipient to maintain a contract administration system to administer its third party contracts adequately to ensure that its contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal requirements. Many FTA recipients

assign contracting duties to financial management personnel. If the recipient lacks qualified personnel within its organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, performing audits the recipient finds desirable, FTA expects the recipient to acquire the necessary services from sources outside the recipient's organization. In addition, these sources should be unrelated to and independent of any potential bidder or offeror.

- a. Written Procurement Procedures. The Common Grant Rules require the recipient to have written procurement procedures. These procedures must address:
 - (1) Property and Services. What types of property and services may be acquired,
 - (2) Procurement Methods. What procurement methods may be used,
 - (3) Legal Restrictions. Any Federal, State, or local restrictions on those acquisitions (discussed further in Chapter III, Section 2 of this circular),
 - (4) Contract Clauses. The requirements for including specific contract clauses (discussed further in Chapter IV of this circular),
 - (5) Sources. The availability of sources for those goods and services (discussed further in Chapter V of this circular),
 - (6) Open Market Procurements. Procedures for procuring in the open market in compliance with Federal laws and regulations (discussed further in Chapter VI of this circular), and
 - (7) Resolution of Contract Issues. Procedures to resolve contract issues (discussed further in Chapter VII of this circular).
- b. Adequate Contract Provisions. All third party contracts are required to include provisions adequate to form a sound and complete agreement. In addition, implementation of Federal laws and regulations requires the addition of many other clauses to assure compliance with the law or regulation. See, Chapter IV of this circular for requirements applicable to third party contractors and the property and services that they agree to provide.
- c. Industry Contracts. The recipient is cautioned to take special care when using an industry developed contract or contract that may be proffered by a bidder or offeror. Not only may it be unlikely to contain the required Federal clauses, but its terms may not be favorable to the recipient.
- d. Record Keeping. The Common Grant Rules require the recipient to prepare and maintain adequate and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project implementation. The Common Grant Rules require the recipient to maintain these records for three years

after the recipient and subrecipients, if any, have made final payments and all other pending matters are closed. In addition to these requirements, the recipient is responsible for the preparing, maintaining, and distributing as necessary the following documents set forth below:

- (1) Procurement History. The Common Grant Rules require the recipient to maintain and make available to FTA written records detailing the history of each procurement, as follows:
 - (a) Procurement Method. The governmental recipient must provide its rationale for the method of procurement it used, while a non-governmental recipient need only provide a justification for lack of competition when it does not obtain competitive bids or offers;
 - (b) Contract Type. The governmental recipient must state the factors for its selection of the contract type it used (fixed price, cost reimbursement, etc.);
 - (c) Contractor Selection. The governmental recipient must state its reasons for contractor selection or rejection, while a non-governmental recipient need only state its reasons for contractor selection; and
 - (d) Cost or Price. Each recipient is required to evaluate and state the basis for the contract cost or price.

FTA takes the position that the extent of documentation should be reasonable. Documents comprising a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements. For example, a \$100 credit card purchase might be accompanied by a receipt or bill from which all of the required information might be implied. More substantial procurements may require voluminous documentation.

- (2) Access to Records. Apart from the more limited record access provisions of the Common Grant Rules, Federal transit law at 49 U.S.C. Section 5325(g) provides FTA and Department of Transportation (DOT) officials and to the Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance authorized by 49 U.S.C. Chapter 53.
- e. Special Notification Requirements for States. For many years, various Federal appropriations laws establishing notification requirements were imposed on all recipients of Federal assistance awards exceeding \$500,000. In the recent past, these appropriation notification requirements have been limited to States. At this time, each State must include text in all its requests for proposals, solicitations, Federal assistance applications, forms, notifications, press releases, or other publications involving FTA assistance, that FTA is or will be providing Federal assistance for the project, the

amount of funding FTA has provided or expects to provide, and the Catalog of Federal Domestic Assistance (CFDA) Number of the program from which the Federal assistance is authorized. Given that appropriations laws expire annually and these provisions have not been enacted as permanent legislation, it is necessary to consult the appropriations act for the applicable fiscal year to determine what level of notification is required. Because general provisions in Federal appropriations laws may be amended year by year, notification requirements may not remain constant. The Master Agreement incorporates the notification requirements in effect when the Master Agreement is issued.

- f. Use of Technology/Electronic Commerce. Along with other technology the recipient may choose to employ, the recipient may use a well-structured Electronic Commerce system to conduct third party procurements, provided that:
 - (1) Written Procedures. Adequate written procedures have been established prior to solicitation, and
 - (2) Sufficient System Capacity. The system can accommodate all requirements for full and open competition in accordance with this circular.
4. AUDIT. Audit of third party contracts is an important tool available to assist the recipient in managing its procurements. In addition to special audits FTA may initiate, the recipient may initiate a third party audit as part of its own management process. In addition, the firm conducting the recipient's single annual audit may recommend the audit of a specific third party contract.
 - a. The Recipient's Auditors. In some cases, the recipient has sufficient qualified personnel that can perform the third party contract audits it believes are needed. In the alternative, the recipient may choose to employ a qualified independent accounting firm or accountant to perform its audit functions.
 - b. Independent Auditors. The recipient's personnel will not be able to perform certain audits required by the Federal Government, such as audits required by the Single Audit Act of 1984, as amended, 31 U.S.C. Sections 7501 et seq. and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," as revised. In addition, when the Federal Government requires other audits, in many cases, it will be necessary for the recipient to engage independent auditors not performing other work for the recipient. See also Chapter IV, Section 2.b (19) (a) of this circular.
 - c. Federal Audit Agencies. In some cases, a continuing Federal audit function is maintained at contractor locations and can be used for audit of a FTA recipient's third party contracts. In other cases, an audit by a Federal agency may best serve the overall government interest. This can be true of audits to determine a contractor's provisional overhead (burden) and General & Administrative (G&A) rates that need to be verified by audit for the applicable contract periods. Federal audit services, however, may not

be available when needed, and it will be necessary to obtain the services of a private firm that can initiate the audit soon after the recipient's request.

CHAPTER IV

THE RECIPIENT'S PROPERTY AND SERVICES NEEDS AND FEDERAL REQUIREMENTS AFFECTING THOSE NEEDS

1. **DETERMINING THE RECIPIENT'S NEEDS.** To use Federal assistance awarded by FTA to finance a procurement, the Common Grant Rules require the recipient to adopt adequate procedures for determining the type and amount of property and services it needs to acquire:
 - a. **Eligibility.** The property and services must be eligible within the scope of a specific project.
 - b. **Necessity.** Proposed procurements should be reviewed to avoid the purchase of property and services the recipient does not need (including duplicative items and unnecessary options.)
 - (1) **Unnecessary Reserves.** The Federal Transit Administration (FTA) is concerned that the recipient does not acquire more property than it currently needs to support its public transportation system, and is particularly concerned that the recipient does not acquire more vehicles than are needed for public transportation service in its service area. See, the most recent version of FTA Circulars 5010.1, 9030.1, and 9300.1 that addresses spare ratios for further guidance.
 - (2) **Assignment Purposes.** In addition, FTA believes it is extremely important that the recipient ensures that it contracts only for its current and reasonably anticipated needs and does not add quantities or options to contracts solely to allow assignment of these quantities or options to another party at a later date.
 - c. **Procurement Size.** Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase.
 - (1) **Joint Procurements.** Depending on market conditions, it may be desirable for a recipient to enter into a joint procurement with other similarly situated recipients. Participation in a joint procurement, however, does not relieve any recipient participating therein from the requirements and responsibilities it would have if it were procuring the property or services itself.
 - (2) **Smaller Procurements.** In other circumstances, breaking out procurements may provide greater opportunities for small businesses and Disadvantaged Business Enterprises (DBEs) to participate. As indicated above, FTA takes the position that it is extremely important that the recipient ensures that it contracts only for its current and reasonably anticipated needs and does not add quantities or options to a contract solely to allow assignment of these quantities or options at a later date. In contrast, the recipient should not split a larger procurement merely to gain eligibility to use small purchase procedures for federally-assisted procurements.

- d. Options. Options may be included in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, a recipient may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract. Procedures for evaluating options are contained in Chapter VI of this circular.
 - e. Lease vs. Purchase. To obtain the best value, lease versus purchase alternatives for acquiring property should be reviewed and, if necessary, an analysis should be obtained to determine the more economical alternative. The recipient may use FTA capital funds to finance the costs of leasing eligible property if leasing is more cost effective than full ownership. FTA requires the recipient to make a written comparison of the cost of leasing the asset compared with the cost of purchasing or constructing it in accordance with FTA regulations, "Capital Leases," 49 CFR Part 639, Subpart C. Costs used in the comparison must be reasonable, based on realistic current market conditions, and based on the expected useful service life of the asset.
 - f. Specifications. Typically, the recipient is responsible for preparing the specifications to meet its needs, while assuring that those specifications are not exclusionary, discriminatory, unreasonably restrictive, or otherwise in violation of Federal laws and regulations. In general, the specifications should include a clear description of the property or services to be procured and indicate how the proposals will be evaluated during the procurement process. For additional guidance, see Chapter IV, Section 2, and Chapter VI, Section 3 of this circular.
2. FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT'S ACQUISITIONS.
- Before FTA assistance may be used to support an acquisition of property or services, all applicable Federal requirements, whether or not addressed in the Common Grant Rules, must be fulfilled. Some of those requirements will affect the third party contractor providing the property or services or even determine which entities may participate as a third party contractor. Other requirements will affect the nature of the property or services to be acquired or the terms under which that property or those services must be acquired. FTA assistance may not be used to support acquisitions that do not comply with all applicable Federal requirements. To facilitate inclusion of required clauses, matrices of the Federally Required and Other Model Clauses can be found in FTA's "Best Practices Procurement Manual." While these clauses cover most areas of concern, the recipient should also check the latest edition of FTA's Master Agreement to determine what requirements have been added, deleted, or changed.

Discussed below are some of the more typical requirements and restrictions that will affect whether FTA assistance can be used to finance a recipient's third party contracts:

- a. Contractor Qualifications. Laws and regulations applicable to contractor selection include the following:
 - (1) "Responsibility" Requirements. In addition to the Common Grant Rules that require awards to responsible contractors, FTA transit law at 49 U.S.C. Section

5325(j) limits third party contractor awards to those contractors capable of successfully performing under the terms of the proposed contract. Notably, SAFETEA-LU now requires fixed guideway project contracts to be awarded after consideration of a contractor's past performance, including information reported in the Contractor Performance Assessment Reports FTA must prepare, 49 U.S.C. Section 5325(j)(2)(C).

- (2) Debarment and Suspension. Any third party contract at any tier of \$25,000 or more, any third party contract at any tier of any amount for a federally required audit, and any third party contract at any tier of any amount that must be approved by an FTA official is covered by Department of Transportation (DOT) regulations, "Governmentwide Debarment and Suspension (Nonprocurement)," 49 CFR Part 29. See, Section 29.220. Thus the recipient must apply DOT's debarment and suspension requirements to itself and each third party contractor at every tier to the extent required by DOT's regulations.

FTA strongly recommends that the recipient check the Excluded Parties List System (EPLS) maintained by the General Services Administration (GSA) and available at <http://epls.gov> before awarding any third party contract, although the recipient may collect a certification from the prospective third party contractor, or include a clause to the third party contract requiring disclosure.

- (3) Conflict of Interest. The recipient must take into consideration conflict of interest issues a prospective contractor might have, including lack of impartiality, impaired objectivity, or unfair competitive advantage, as discussed more fully in Chapter VI, Section 2.a(4)(h).
- (4) Lobbying Certification and Disclosure. If the third party contract will exceed \$100,000, the recipient must obtain a lobbying certification, and if applicable, a lobbying disclosure from the third party contractor before award, as well as require compliance with DOT regulations, "New Restrictions on Lobbying," 49 CFR Part 20, modified as necessary by 31 U.S.C. Section 1352.
- (5) Federal Civil Rights Laws and Regulations. Although FTA does not have primary enforcement responsibility for all Federal Civil Rights laws and regulations, each FTA recipient has agreed that it and its third party contractors must be in compliance with:
 - (a) Federal Equal Employment Opportunity (EEO) Requirements. These include but may not be limited to:
 - 1 49 U.S.C. Section 5332, and
 - 2 Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, and implementing Federal regulations.

- (b) Federal Laws Protecting Individuals with Disabilities. These include, but may not be limited to:
- 1 Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794, and implementing DOT regulations, “Nondiscrimination on the Basis of Disability in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 CFR Part 27; and
 - 2 Title I of the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. Sections 12101 et seq., and the following implementing Federal Regulations:
 - a DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37, and
 - b Joint Architectural and Transportation Barriers Compliance Board (ATBCB)/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.
- (6) Socio-Economic Development. Each FTA recipient must comply with applicable Federal laws and regulations that afford competitive opportunities for a contractor that qualifies as a disadvantaged business enterprise (DBE), minority owned firm, women’s business enterprise, or small business.
- (a) Disadvantaged Business Enterprises (DBE). Section 1101(b) of SAFETEA–LU requires FTA to make available at least 10 percent of the its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient assists FTA in meeting this national goal. Each FTA recipient must comply with applicable requirements of DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26, (DBE regulations), in order to receive FTA funding. Third party contracts funded in whole or in part with FTA funds and subject to FTA’s procurement rule are also subject to the recipient’s DBE Program and are included to the extent of FTA funding in determining (i) whether the recipient meets the DBE threshold for goal setting; and, (ii) the goal if the threshold is met.
 - (b) Small and Minority Firms and Women’s Business Enterprises. The Common Grant Rules require each recipient and subrecipient to take steps to assure that small and minority firms and women’s business enterprises (irrespective of whether or not they qualify as DBEs) are used when possible, and to the fullest extent practicable. As an aside, while the Common Grant Rule for governmental recipients includes labor surplus area firms in the category of firms authorized for special treatment, this circular does not include them

because nearly all labor surplus area preferences were deleted following enactment of Subsection 7101(a) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355, October 13, 1994).

- 1 Notice. The Common Grant Rules require each recipient to make information available to potentially qualified firms about procurement opportunities. Each governmental recipient is directed to include these contractors on solicitation lists and solicit their participation when they are potential sources.
 - 2 Contract Size. Each governmental recipient is directed to divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation. Each non-governmental recipient is directed to encourage contracting with consortiums when a contract is too large for one of these firms to handle individually.
 - 3 Delivery Schedule. The Common Grant Rules require recipients to establish delivery schedules that encourage their participation.
 - 4 Small Business Administration and the Department of Commerce's Minority Business Development Agency. The Common Grant Rules direct each recipient to use the services and assistance of these Federal agencies.
 - 5 Subcontracting Opportunities. Each governmental recipient is expected to require its prime third party contractors to include the preceding requirements in their FTA assisted subcontracts. Each non-governmental recipient is directed to consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.
- (7) Sensitive Security Information. Each third party contractor must protect, and take measures to assure that its subcontractors at each tier protect, "sensitive security information" made available during the course of administering a third party contract or subcontract in accordance with 49 U.S.C. Section 40119(b) and implementing DOT regulations, "Protection of Sensitive Security Information," 49 CFR Part 15, and with 49 U.S.C. Section 114(s) and implementing Department of Homeland Security regulations, "Protection of Sensitive Security Information," 49 CFR Part 1520.
- (8) Seat Belt Use. In compliance with Federal Executive Order No. 13043, "Increasing Seat Belt Use in the United States," 04–16–1997, 23 U.S.C. Section 402 note, each third party contractor is encouraged to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in any third party subcontracts, involving the project.

- b. Restrictions on Acquisitions of Property and Services. The following requirements are derived from Federal laws and regulations that may affect a specific procurement. A current but not all inclusive and comprehensive list of statutory and regulatory requirements applicable to recipient procurements (such as Disadvantaged Business Enterprise (DBE) and Clean Air, is contained in the FTA Master Agreement. FTA's Master Agreement states that applicable Federal requirements be applied to project participants to the lowest tier necessary for compliance with the requirement and be set forth in each subagreement, lease, third party contract, or other document pertaining to that participation. Further guidance concerning these requirements and suggested wording for contract clauses may be found in FTA's "Best Practices Procurement Manual." For specific guidance concerning the crosscutting requirements of other Federal agencies, the recipient is advised to contact those agencies.
- (1) Scope of the Project. The property or services acquired must be within the scope of the underlying grant or cooperative agreement from which the Federal assistance to be used is derived. These restrictions will be derived from FTA's enabling legislation and implementing regulations. The recipient should take care that its third party contracts are within the scope of the grant or cooperative agreement from which Federal support will be derived.
- (2) Period of Performance—Limits. A third party contract's period of performance, including any extensions thereof, should not be any longer than minimally necessary to accomplish the purpose of the contract. Additional factors to be considered include competition, pricing, fairness, and public perception. Thus FTA expects each recipient to use sound business judgment in establishing performance periods and any extensions, irrespective of the length of time involved. The recipient's procurement files should document its rationale for determining the performance period of each contract.

Except for procurements of rolling stock and replacement part contracts, which are limited by law to five years as discussed in paragraph (14)(h) of this subsection, the recipient's other third party contracts (such as property, services, leases, construction, revenue, etc.) are not encumbered by Federal requirements restricting the maximum periods of performance. The five-year statutory limitation on rolling stock does not extend to the recipient's other contracts. Nevertheless, the duration of the recipient's other contracts must be reasonable.

After a third party contract has been awarded, a time extension of the contract not authorized by the original terms of the contract would in effect be an out-of-scope change that will require a sole source justification and meet other sole source procurement requirements. Consistent with the general tone of the circular, contract extensions will be considered in light of whether they are in-scope or out-of-scope contract changes. Out-of-scope changes will be regarded as new sole source procurements.

- (3) Federal Cost Principles. The Common Grant Rules require costs to conform to Federal cost principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized, or not prohibited, by Federal law and regulations, and in conformance with Federal cost principles applicable to the recipient. Separate cost principles apply to the following four categories of recipients:
 - (a) Governmental Entities. Office of Management and Budget (OMB) Guidance for Grants and Agreements, “Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87),” 2 CFR Part 225, applies to project costs incurred by a recipient that is a State, local, or Indian tribal government.
 - (b) Education Institutions. OMB Guidance for Grants and Agreements, “Cost Principles for Educational Institutions (OMB Circular A–21),” 2 CFR Part 220, applies to project costs incurred by a recipient that is an institution of higher education.
 - (c) Non-Profit Organizations. OMB Guidance for Grants and Agreements “Cost Principles for Non-profit Organizations (OMB Circular A–122),” 2 CFR Part 230, applies to project costs incurred by a recipient that is a private non-profit organization.
 - (d) For-Profit Organizations. FAR Subpart 31.2, “Contracts with Commercial Organizations,” applies to project costs incurred by a recipient that is a for-profit organization.
- (4) Payment Provisions. While the recipient may use its own funds to make payments on its third party contracts, it will need to structure its payment provisions carefully if it seeks to use FTA funds, be reimbursed with FTA funds, or dedicate its local share funds to support those costs.
 - (a) General. At the outset, FTA assistance may be used to support or reimburse those payments only if:
 - 1 Award Made. FTA has awarded Federal assistance to the recipient through a grant or cooperative agreement for the underlying project,
 - 2 Pre-Award Authority. FTA has provided pre-award authority for the underlying project through a Federal Register Notice, or
 - 3 Letter of No Prejudice. FTA has issued a letter of no prejudice for the underlying project.

- (b) Advance Payments. Advance payments are payments made to the contractor before the contractor incurs costs in the performance of the contract. The following principles and restrictions apply:

- 1 Use of FTA Funds Prohibited. FTA does not authorize the use of Federal assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable.
- 2 Exceptions for Sound Business Reasons. FTA does on occasion make exceptions to its advance payment prohibitions, provided the recipient has obtained FTA's prior written concurrence. A recipient that seeks to use FTA or local share funds to support advance payments should contact its Regional Office to obtain FTA concurrence.

FTA takes the position that sound business reasons justify its concurrence permitting exceptions in certain circumstances:

- a Customary Advance Payments. FTA recognizes that advance payments are typically required for utility services and subscriptions to newspapers and magazines. Accordingly, the recipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when advance payment or payments customarily required in the market place exceed \$100,000.
- b Adequate Security for Payments. FTA recognizes that advance payments may be needed for mobilization payments; start up costs, and other costs supported by sound business judgment. Adequate security for the advance payment is an essential pre-condition to FTA's concurrence in the use of FTA or local share funds.

In sum, provided there are sound business reasons justifying the advance payment and adequate security for the payment, FTA will generally concur in a written request for an exception.

- (c) Progress Payments. Progress payments are payments for costs incurred by the contractor in the performance of the contract before the contract work has been completed. FTA assistance may be used to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work performed for which payment is requested.

The recipient must obtain adequate security for progress payments. Adequate security may include taking title or obtaining a letter of credit or equivalent means to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different

procurement scenarios and factual circumstances. FTA acknowledges the practical reality that taking title to work in progress may not be desirable in some circumstances. Each recipient should always consider the costs associated with this security (e.g., bonds or letters of credit must be purchased in the commercial marketplace) and the impact those costs have on the contract price, as well as the consequences of incomplete performance as it considers what constitutes adequate security for a given procurement.

The Common Grant Rules authorize progress payments for construction contracts to be made on a percentage of completion method described therein. This payment method may not be used in non-construction contracts.

- (5) Preference for U.S. Property—Buy America. FTA cautions that its Buy America regulations that apply to third party procurements, published at 49 CFR Part 661, differ from Federal “Buy American Act” regulations that apply to direct Federal procurements, published in the FAR at 48 CFR Chapter 1, Subparts 25.1 and 25.2. The recipient is strongly advised to review these regulations before undertaking any procurement to assure compliance with the requirements applicable at the time the procurement will be undertaken.
- (6) Shipments of Property—U.S. Flag Requirements.
 - (a) Shipments by Ocean Vessel. The Common Grant Rules require third party contract provisions to assure compliance with 46 U.S.C. Section 55303 and Maritime Administration regulations, “Cargo Preference U.S. Flag Vessels,” 46 CFR Part 381, which provide for the use of U.S. Flag vessels to ship at least 50 percent of any federally-assisted property to be transported on ocean vessels.
 - (b) Shipments by Air Carrier. Third party contracts involving shipments of federally-assisted property by air carrier will require provisions to assure compliance with Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, as amended, known as the “Fly America” Act, 49 U.S.C. Section 40118, and GSA regulations, “Use of United States Flag Air Carriers,” 41 CFR Sections 301–10.131 through 301–10.143, which provide for shipment by U.S. flag air carriers unless such carriers are not reasonably available within the standards of GSA’s implementing regulations.
- (7) Project Travel—Use of U.S. Flag Air Carriers. Third party contracts to acquire air travel services for people participating in a federally-assisted project require provisions facilitating compliance with Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, as amended, known as the “Fly America” Act, 49 U.S.C. Section 40118, and GSA regulations, “Use of United States Flag Air Carriers,” 41 CFR Sections 301–10.131 through 301–10.143, which provide for the use of U.S. flag air carriers unless U.S. flag air

carriers are not reasonably available within the standards of the GSA's implementing regulations.

- (8) Wage and Hour Requirements. The Common Grant Rules require the inclusion of clauses requiring the contractor to compute the wages of every mechanic and laborer on the basis of a standard workweek of 40 hours. Work in excess of the standard workweek is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the workweek. These clauses are required to implement Sections 102 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Section 3702, and with Department of Labor (DOL) regulations, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 CFR Part 5. Notably, the thresholds of \$2,000 for construction work and \$2,500 for nonconstruction work set forth in the Common Grant Rules have been increased by law so that these requirements apply only to federally-assisted contracts in excess of \$100,000.
- (9) Environmental Protections. The recipient is required to comply with environmental requirements and implement them as necessary through its third party contracts.
 - (a) Environmental Mitigation. Third party contract provisions may be required to facilitate the recipient's compliance with environmental regulations it has agreed to implement.
 - (b) National Environmental Policy Act (NEPA). Certain acquisitions and the timing of certain acquisitions can adversely affect the environmental review process for a project constituting a major Federal action.
 - 1 Property. The recipient must refrain from entering into binding arrangements for acquisitions of property that may or would affect environmental impact determinations with respect to the underlying project or otherwise interfere with any required environmental impact reviews until applicable environmental impact determinations have been made.
 - 2 Services. The recipient must obtain from the contractor selected to prepare an environmental impact statement a disclosure statement specifying that the contractor has no financial or other interest in the outcome of the project, in accordance with Council on Environmental Quality regulations, "Other Requirements of NEPA," 40 CFR Part 1506, at Section 1506.5(c).
 - (c) Clean Air. The Common Grant Rules specifically require each third party contract at any tier exceeding \$100,000 to be implemented without the use of

facilities included in the Environmental Protection Agency (EPA) “List of Violating Facilities,” and in compliance with all applicable standards, orders, or regulations issued pursuant to Section 306 of the Clean Air Act, as amended, 42 U.S.C. Section 7414, and other applicable provisions of the Clean Air Act, as amended, 42 U.S.C. Sections 7401 through 7671q.

- (d) Clean Water. The Common Grant Rules specifically require each third party contract at any tier exceeding \$100,000 to be implemented without the use of facilities included in the EPA “List of Violating Facilities,” and in compliance with all applicable standards, orders, or regulations issued pursuant to Section 508 of the Clean Water Act, as amended, 33 U.S.C. Section 1368, and other applicable requirements of the Clean Water Act, as amended, 33 U.S.C. Sections 1251 through 1377.
- (e) Recycled Products. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6962, requires governmental recipients to provide a competitive preference to products and services that conserve natural resources, protect the environment, and are energy efficient. In accordance with EPA guidelines, “Comprehensive Procurement Guidelines for Products Containing Recovered Materials,” 40 CFR Part 247 through Part 253, third party contracts of \$10,000 or more must specify a competitive preference for products containing recycled materials identified in those EPA guidelines.
- (f) Other Federal Environmental Requirements. Third party contract provisions may be needed to facilitate the recipient’s requirements to implement other Federal laws and regulations. FTA’s Master Agreement includes a list of environmental laws and regulations that may affect the acquisition of a property or service to be financed with Federal assistance. These laws and regulations encompass various provisions that facilitate the recipient’s requirements to protect parks, recreation areas, wildlife or waterfowl refuges, wild and scenic rivers, coastal zones, wetlands, fisheries, endangered species, historic sites, and Indian sacred sites.
- (10) Energy Conservation. The Common Grant Rules require third party contract provisions to facilitate compliance with applicable mandatory energy efficiency standards and policies of applicable State energy conservation plans issued in accordance with the Energy Policy and Conservation Act, as amended, 42 U.S.C. Sections 6321 et seq.
- (11) Metric Measurements. The Common Grant Rules require the recipient to accept property and services with dimensions expressed in metric measurements, to the extent practicable and feasible in compliance with the Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act, 15 U.S.C. Sections 205a et seq.; Executive Order No. 12770, “Metric Usage in Federal Government

Programs,” 07–25–1991, 15 U.S.C. Section 205a note; and DOT or FTA regulations and directives.

- (12) Intelligent Transportation Systems. Intelligent transportation system (ITS) property and services must comply with the National Intelligent Transportation Systems (ITS) Architecture and Standards to the extent required by SAFETEA–LU Section 5307(c), 23 U.S.C. Section 512 note, and FTA’s published policies. Consequently, third party contracts involving ITS are likely to require provisions to facilitate compliance with Federal requirements.
- (13) Electronic Reports and Information. Third party contracts for delivery of reports or other information in electronic format that the recipient intends to provide to FTA, among others, require specifications assuring that, when delivered to the recipient, the reports or information will be in compliance with accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 794d, and ATBCB regulations, “Electronic and Information Technology Accessibility Standards,” 36 CFR Part 1194.
- (14) Rolling Stock—Special Requirements.
 - (a) Accessibility. Rolling stock must be in compliance with the accessibility provisions of DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37, and Joint Architectural and Transportation Barriers Compliance Board (ATBCB)/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.
 - (b) Transit Vehicle Manufacturer Compliance with DBE Requirements. Pursuant to 49 CFR Section 26.49, before a transit vehicle manufacturer (TVM) may submit a bid or proposal to provide vehicles to be financed with FTA assistance, that TVM must submit a certification that it has complied with FTA’s DBE requirements.
 - (c) Minimum Service Life. FTA requires each recipient to maintain satisfactory continuing control of FTA assisted property. In the case of vehicles, especially buses, FTA has established minimum service life policies. Consequently, third party contracts for vehicle acquisitions will require provisions to facilitate compliance with those service life policies. See, the most recent version of FTA Circulars 5010.1, 9030.1, and 9300.1 that addresses minimum service life for vehicles.
 - (d) Air Pollution and Fuel Economy. Third party contracts to acquire rolling stock must contain provisions to facilitate the recipient’s compliance with applicable Federal air pollution control and fuel economy regulations.

- (e) Pre-Award and Post-Delivery Review. Third party contracts to acquire rolling stock require provisions to assure compliance with applicable requirements of 49 U.S.C. Section 5323(m) and FTA regulations, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” 49 CFR Part 663, that do not conflict with 49 U.S.C. Section 5323(m).
- (f) Bus Testing. Third party contracts to acquire a new bus model or a bus with significant alterations to an existing model require provisions to assure compliance with applicable requirements of FTA regulations, “Bus Testing,” 49 CFR Part 665.
- (g) In-State Dealers. In accordance with 49 U.S.C. Section 5325(i), third party procurements of buses may not be limited to in-State dealers.
- (h) Basis for Award. To comply with 49 U.S.C. Section 5325(f), the recipient may award a third party contract for rolling stock based on initial capital costs, or based on performance, standardization, life cycle costs, and other factors, or by selection through a competitive procurement process.
- (i) Five-Year Limitation. To comply with 49 U.S.C. Section 5325(e)(1), a multi year third party contract to purchase additional rolling stock and replacement parts may not have options that extend more than five years after the date of the original contract.

FTA interprets this five-year period as covering the recipient’s rolling stock and replacement needs from the first day when the contract becomes effective to those at the end of the fifth year. This means that the contract may not encompass more rolling stock and replacement parts than the recipient needs within five years. The five-year rule does not mean delivery, acceptance, or even fabrication must be completed in five years—only that a contract is limited to purchasing no more than the recipient’s rolling stock or replacement parts needs for five years based on the effective date of the contract.

- (15) Architectural/Engineering and Related Service—Special Requirements. In connection with projects related to or leading to construction, an FTA recipient must use qualifications-based competitive proposal procedures of 40 U.S.C. Chapter 11 (i.e., Brooks Act, procedures) when contracting for architectural and engineering services, described in 49 U.S.C. Section 5325(b), to include not only traditional architectural engineering services, but also program management, engineering, construction management, a feasibility study, and preliminary engineering, design, engineering, surveying, mapping, or related services. FTA recognizes that most of the services listed (e.g., feasibility studies or mapping) may not be performed by architectural or engineering services companies. While, qualifications-based competitive proposals (i.e., Brooks Act procedures) still must be applied to procurements of services enumerated in 49 U.S.C. Section 5325(b), FTA seeks to clarify that its interpretation of that statute as authorizing the use of

qualifications-based procurement procedures for those services only when they support or are connected or related to real property. FTA's position is consistent with typical Federal policies implementing the Brooks Act, which is limited to research, planning, development, design, construction, alteration, or repair of real property, as set forth in 40 U.S.C. Section 1102. Consequently, the recipient may not use qualifications-based procurement procedures for services that are not in support of or connected or related to real property, except to the extent FTA expressly permits otherwise in writing.

SAFETEA-LU also divided the former Brooks Act provision by authorizing State audit services in lieu of Federal standards. In part, the statute reads "... to the extent a State has adopted by law, before the date of enactment of the Federal Public Transportation Act of 2005, an equivalent State qualifications-based requirement for contracting for architectural, engineering, and design services." 49 U.S.C. 5325(b)(2).

In addition, SAFETEA-LU amended 49 U.S.C. Section 5325 to require the use of FAR or a cognizant State agency's cost principles and a firm's audited indirect cost principles for contract estimates, negotiation, administration, reporting, and payments, and apply those undisputed rates. See, 49 U.S.C. Section 5325(b)(3) and Section 2.b(19)(b)3 of this chapter.

(16) Construction—Special Requirements.

- (a) Bonding. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. FTA's bonding policies are as follows:
 - 1 Bid Guarantee. Both FTA and the Common Grant Rules require a bid guarantee from each bidder equivalent to 5 percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will honor its bid upon acceptance of its bid.
 - 2 Performance Bond. Both FTA and the Common Grant Rules require a performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under the contract.
 - 3 Payment Bond. The Common Grant Rules specify a standard payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all people supplying labor and material in the execution of the work provided for in the contract. FTA, however, has

determined the following payment bond amounts are adequate to protect FTA's interest:

FTA has determined the payment bonds in the following amounts are adequate to protect FTA's interest and will accept a local bonding policy that meets the following minimums:

- a Less Than \$1 Million. Fifty percent of the contract price if the contract price is not more than \$1 million;
 - b More Than \$1 Million but Less Than \$5 Million. Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million; or
 - c More Than \$5 Million. Two and one half million dollars if the contract price is more than \$5 million.
- 4 Acceptable Sureties. A non-governmental recipient is required to obtain construction bonds from companies holding certificates of authority as acceptable sureties pursuant to Department of the Treasury regulations, "Surety Companies Doing Business with the United States," 31 CFR Part 223. For a current list of approved sureties, see Department of the Treasury's Listing of Approved Sureties (Department Circular 570), <http://fms.treas.gov/c570/c570.html>. FTA strongly encourages each governmental recipient to require similarly acceptable sureties.

FTA will accept a local bonding policy that meets the minimums set forth above. FTA reserves the right to approve bonding that does not meet these minimums if the local bonding policy adequately protects the Federal interest. A recipient that wishes to adopt less stringent bonding requirements, for a specific class of projects, or for a particular project, may submit its policy and rationale to its FTA Regional Office for approval.

FTA approval is not required for more stringent local bonding policies, but FTA cautions that if the recipient's bonding policies result in "excessive bonding" prohibited under the Common Grant Rules as restrictive of competition, FTA will not provide Federal assistance for those procurements. Consequently, if the recipient's bonding policies exceed those described in this subsection; the recipient is strongly encouraged to obtain FTA's written concurrence to assure the availability of Federal assistance for the project.

- (b) Seismic Safety. Third party contracts for the construction of new buildings or additions to existing buildings must be constructed in accordance with 42 U.S.C. Sections 7701 et seq. and DOT regulations, "Seismic Safety," 49 CFR Part 41 at Sections 41.117 and 41.120.

- (c) Value Engineering. The Common Grant Rule for governmental recipients encourages the governmental recipient to use value engineering clauses in contracts for construction projects. FTA will not approve a New Starts grant application for final design funding or a full funding grant agreement until value engineering is complete. It is important to note that some contractual arrangements (e.g., design-build contracts) may inherently include value engineering concepts and principles. Where this is the case, FTA does not require separate value engineering proposals, contract changes, or other processes. From a procurement view, the concept of value engineering is more important than the form it takes.
- (d) Equal Employment Opportunity. The Common Grant Rules require that third party construction contracts include provisions requiring compliance with DOL regulations, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,” 41 CFR Parts 60 et seq., which implement Executive Order No. 11246, “Equal Employment Opportunity,” as amended by Executive Order No. 11375, “Amending Executive Order No. 11246 Relating to Equal Employment Opportunity.”
- (e) Prevailing Wages. In accordance with 49 U.S.C. Section 5333(a), Davis-Bacon Act prevailing wage protections apply to laborers and mechanics employed on FTA assisted construction projects. Thus, the Common Grant Rules specify that for third party contracts at any tier exceeding \$2,000, provisions are needed requiring compliance with the Davis-Bacon Act, 40 U.S.C. Sections 3141 et seq. and as supplemented by DOL regulations, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction,” 29 CFR Part 5. The Davis-Bacon Act requires contractors to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors are required to pay wages not less than once a week. A copy of the current prevailing wage determination issued by DOL must be placed in each contract solicitation and the award of a contract must be conditioned upon the acceptance of the wage determination. These requirements are in addition to in addition to the Wage and Hour Requirements addressed in Section 2.b(7) of this chapter.
- (f) Anti-Kickback. For all third party construction and repair contracts at any tier, the Common Grant Rules require provisions for compliance with the Copeland “Anti Kickback” Act, as amended, 18 U.S.C. Section 874, and implementing DOL regulations, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States,” 29 CFR Part 3. The Act provides that each contractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled.

- (g) Construction Safety. The Common Grant Rules require provisions to ensure safety at construction sites so that no laborer or mechanic shall be required to work in surroundings or under working conditions that are unsanitary, hazardous, or dangerous in accordance with safety requirements of Section 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Section 3704, and implementing DOL regulations, “Safety and Health Regulations for Construction,” 29 CFR Part 1926. Notably, the thresholds of \$2,000 for construction work set forth in the Common Grant Rules have been increased by law so that these requirements apply only to federally-assisted construction contracts in excess of \$100,000.
- (h) Labor Neutrality. A recipient’s third party contracts may not require or prohibit the use of project labor agreements (PLA), except, if special circumstances require the use of a PLA to avert an imminent threat to public health or safety. Third party contractors or subcontractors may, however, voluntarily enter into PLAs. These provisions facilitate implementation of Executive Order No. 13202, “Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects,” 02–17–2001, as amended by Executive Order No. 13208, 04–06–2001, 41 U.S.C. Section 251 note.
- (i) Preference for U.S. Property. For any third party contract exceeding \$100,000, FTA’s “Buy America Requirements,” 49 CFR Part 661 require the third party contractor to provide property produced or manufactured in the United States in accordance with FTA’s regulations unless a waiver authorized by those regulations has been granted. A third party contractor that provides services is also required to comply with FTA’s Buy America regulations in connection with any new property it acquires to fulfill its contractual responsibilities.

FTA cautions that its Buy America regulations are complex and differ from Federal “Buy American Act” regulations in FAR Subparts 25.1 and 25.2.

- (j) Accessibility. Facilities and vehicles used in the provision of public transportation services must be in compliance with 42 U.S.C. Sections 12101 et seq. and DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37; and Joint Architectural and Transportation Barriers Compliance Board (ATBCB)/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.
- (17) Public Transportation Services—Special Requirements. Although the following matters are not covered by Federal regulations pertaining to federally-assisted procurements, the following will affect how a third party contractor implements its contract to provide services. Consequently, either the third party contract itself

must include provisions assuring compliance with the following matters, or the recipient must obtain the third party contractor's agreement in another form, as a matter of contractor responsibility, to assure compliance with the following:

- (a) Protections for Public Transportation Employees. When the recipient purchases public transportation services from a third party contractor, the terms of the recipient's DOL certification of employee protective arrangements will apply to work under the contract provided by employees covered by the certification. For this reason, third party contracts involving the employment of public transportation employees are covered by the protections of 49 U.S.C. Section 5333(b) and DOL guidelines, "Section 5333(b), Federal Transit Law," 29 CFR Part 215.
 - (b) Drug and Alcohol Testing. A third party contractor providing services involving the performance of safety sensitive functions must comply with 49 U.S.C. Section 5331 and FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 CFR Part 655.
 - (c) Accessibility. Facilities and vehicles used in the provision of public transportation services must be in compliance with 42 U.S.C. Sections 12101 et seq. and DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 CFR Part 37; and Joint Architectural and Transportation Barriers Compliance Board (ATBCB)/DOT regulations, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 CFR Part 1192 and 49 CFR Part 38.
 - (d) Protection of Animals. A third party contractor performing services involving the use of animals is required must comply with Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
 - (e) Charter Service Restrictions. A third party contractor performing services using FTA assisted facilities or equipment may not use those facilities or that equipment to support any charter service operations except as permitted by 49 U.S.C. Section 5323(d) and FTA regulations, "Charter Service," 49 CFR Part 604 that are consistent with 49 U.S.C. Section 5323(d).
 - (f) School Bus Restrictions. A third party contractor performing services using FTA assisted facilities or equipment may not use those facilities or that equipment to support exclusive school bus operations except as permitted by 49 U.S.C. Sections 5323(f) or (g) and FTA regulations, "School Bus Operations," 49 CFR Part 605, to the extent consistent with 49 U.S.C. Section 5323(f) or (g).
- (18) Research, Development, Demonstration, Deployment, and Special Studies—Special Requirements. Procurements of research type services can involve

circumstances that bring special Federal requirements into effect. Among these are:

- (a) Patent Rights. Irrespective of the status of the recipient, subrecipient, or third party contractor (i.e., a large business, small business, State government, State instrumentality, local government, Indian tribe, non-profit organization, institution of higher education, individual, etc.) the Common Grant Rules require provisions invoking the requirements of Department of Commerce regulations, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms,” 37 CFR Part 401 (implementing 35 U.S.C. Sections 200 et seq.), except to the extent the Federal Government requires otherwise. Except in the case of an “other agreement” in which the Federal Government has agreed to take more limited rights, the Federal Government is entitled to a non-exclusive royalty free license to use the patent for Federal Government purposes.
- (b) Rights in Data. In general, FTA’s purpose in providing Federal assistance for a research, development, demonstration, or special studies project is to increase transportation knowledge, rather than limit the benefits of the project-to-project participants. Therefore, except to the extent FTA determines otherwise in writing, FTA imposes the following rights in data requirements for FTA assisted research, development, demonstration, or special studies projects.
 - 1 Publication Restrictions. Except for its own internal use, neither the recipient nor the third party contractor may publish or reproduce subject data in whole or in part, or in any manner or form, without the prior written consent of the Federal Government, unless the Federal Government has previously released or approved the release of such data to the public; the foregoing prohibition does not apply to an institution of higher education.
 - 2 Distribution of Data. Each recipient and third party contractor must agree that, in addition to the rights in data and copyrights that it must provide to FTA in accordance with the Common Grant Rules, FTA may make available to any FTA recipient, subrecipient, third party contractor, or third party subcontractor, either FTA’s license in the copyright to the subject data or a copy of the subject data. If the project is not completed for any reason whatsoever, all data developed under the project shall become subject data and shall be delivered as FTA may direct. The foregoing provisions do not apply to contracts for adaptations of automatic data processing equipment or to data provided in support of FTA capital projects.

FTA, however, may determine in certain circumstances that it is in the public interest to take only those rights in data provided by the Common Grant Rules.

- (c) Export Control. If data developed in the course of a third party contract is subject directly or indirectly to U.S. Export Control regulations, that data may not be exported to any countries or any foreign persons, without first obtaining the necessary Federal license or licenses and complying with any applicable U.S. Export Control regulations.
 - (d) Protection of Human Subjects. A third party contractor performing services involving the use of human subjects is required must comply with 42 U.S.C. Sections 289 et seq., and DOT regulations, "Protection of Human Subjects," 49 CFR Part 11.
 - (e) Protection of Animals. A third party contractor performing services involving the use of animals is required must comply with 7 U.S.C. Sections 2131 et seq., and Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
- (19) Audit Services. In general, audit services financed with FTA assistance must be procured in accordance with the standard procedures of this circular. The following considerations, however, are especially important in procurements of audit services.
- (a) Single Audit Act. Each recipient that expends \$500,000 or more in Federal awards in a single year is expected to procure audit services to fulfill the requirements of the Single Audit Act of 1984, as amended, 31 U.S.C. Sections 7501 et seq. and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," as revised.
 - 1 Organizational Conflict of Interest. It is essential that any auditor selected be independent of the recipient.
 - 2 Eligibility of Costs. Costs for audits required by OMB Circular A-133 may be charged to the recipient's project as direct or indirect costs as permitted by the Federal Cost Principles applicable to the recipient. A recipient that expends less than \$500,000 in Federal awards in a single year is not required to arrange for this audit and may not finance the costs of such an audit with Federal funds.
 - (b) Other Project Audits. A recipient that seeks an audit of a specific third party contract should consider the implications of the following before procuring audit services.

- 1 Organizational Conflict of Interest. In general, any auditor selected must be independent of the third party contractor to be audited.
 - 2 Verification of Indirect Costs. Federal verification of a contractor's indirect cost rates (such as provisional overhead (burden) and General & Administrative (G&A) rates) may be required. Some information sought may be available through undisputed audits that have been previously performed.
 - 3 Duplication of Services. While audits of third party contracts can be desirable, it is especially useful to contact FTA before engaging such services to preclude duplication and to assure the eligibility of the particular services for Federal participation. This is particularly important in connection with the procurement of architectural and engineering (A&E) services, because FTA is required by 49 U.S.C. Section 5325(b)(3) to assure that A&E contracts are audited in accordance with FAR Part 31 cost principles or State cognizant agency standards, and that A&E contractors and subcontractors must accept indirect cost rates established in accordance with those FAR or State cognizant agency principles if those rates are not under dispute. For this reason, it is essential that duplicative audits likely to produce disparate indirect cost rates may not be undertaken. Accordingly, FTA recommends that the recipient seek guidance from the cognizant Federal auditor or agency that approved the third party contractor's indirect cost rates before negotiating audit contract agreements.
 - 4 Eligibility of Costs. Costs of third party contract audit and proposal evaluation are eligible for reimbursement by FTA as a direct or indirect charge in accordance with applicable Federal cost principles. FTA reserves the right to disallow payments for duplicative audit charges.
- (20) Use of \$1 Coins. To facilitate compliance with Section 104 of the Presidential \$1 Coin Act of 2006, 31 U.S.C. Section 5312(p), FTA assisted property that requires the use of coins or currency in public transportation service or supporting service must be fully capable of accepting and dispensing \$1 coins.
- c. Performance Difficulties. The Common Grant Rule for governmental recipients authorizes FTA to require each governmental recipient to include clauses to ameliorate possible difficulties that can be encountered during contract performance. In addition to other clauses that may be approved by the Office of Federal Procurement Policy, FTA may seek the inclusion of clauses described below:
- (1) Changes. Changes and changed conditions clauses can be very desirable in large construction contracts, among others.

- (2) Remedies. The Common Grant Rule for governmental recipients provides as follows:
- (a) Delay. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion and the extent or amount of such damages would be difficult or impossible to determine. The rate and measurement period must be specified in the third party contract and may not be excessive. The assessment for damages is usually established at a specific rate per day for each day beyond the contract's delivery date or performance period, but a measurement period other than a day may be established if appropriate. The measurement period for liquidated damages may be other than a day, where some other measuring period is appropriate. Any liquidated damages recovered shall be credited to the project account involved unless FTA permits otherwise.
 - (b) Violation or Breach. Third party contracts exceeding \$100,000 must include administrative, contractual, or legal remedies for violations or breach of the contract by the third party contractor.
 - (c) Suspension of Work. FTA may require provisions pertaining to suspension of work.
 - (d) Termination. For contracts exceeding \$10,000, there must be termination for cause and termination for convenience provisions.

While the Common Grant Rule for non-governmental recipients does not expressly require contract remedies or termination clauses, FTA strongly encourages the inclusion of appropriate remedy clauses in all third party contracts.

CHAPTER V

SOURCES

A recipient will often have several sources from which to obtain the property and services it needs as described below:

1. FORCE ACCOUNT. As used in this circular, “force account” means the recipient’s own labor forces and equipment. To assure that the recipient will have adequate technical capacity to perform its public transportation and contracting responsibilities in connection with the project, The Federal Transit Administration’s (FTA’s) grant or cooperative agreement secures FTA the right to determine the extent to which Federal assistance may be used to participate in force account costs.
2. SHARED USE. The Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into agreements for shared use of common goods and services. FTA encourages non-governmental recipients to consider joint procurements if economical and feasible.
3. JOINT PROCUREMENT. The Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into State and local intergovernmental agreements for procurements for common goods or services. FTA also permits non-governmental recipients to consider joint procurements if economical and feasible. FTA encourages recipients to procure goods and services jointly with other recipients to obtain better pricing through larger purchases. Joint procurements offer the additional advantage of being able to obtain goods and services that exactly match each cooperating recipient’s requirements. When obtaining goods or services in this manner, each recipient must ensure that all Federal requirements, required clauses, and certifications are included in the resulting joint solicitation and contract documents and properly implemented.
4. STATE PURCHASING SCHEDULES. State Purchasing Schedules or other State contracts may also be available for recipient and subrecipient use. These permit subordinate government agencies to buy from established State schedules akin to the General Services Administration (GSA) schedules used by Federal agencies.

FTA takes the position that a recipient may acquire property or services through these contracts provided all parties agree to append the required Federal clauses in the purchase order or other document that effects the recipient’s procurement. When obtaining goods or services in this manner, each recipient must ensure that all Federal requirements, required clauses, and certifications (including Buy America) are included in the resulting joint solicitation and contract documents and properly implemented, whether in the master intergovernmental contract or in the recipient’s purchase document. When buying from these schedule contracts, the recipient should obtain Buy America certification before entering into the purchase order. If the property to be acquired complies with FTA’s Buy America regulations and underlying law, there is no problem. If the property is not Buy

America compliant, the recipient will still have to obtain a waiver from FTA before proceeding.

5. FEDERAL EXCESS AND SURPLUS PROPERTY. The Common Grant Rule for governmental recipients encourages recipients to use Federal excess and surplus property managed by the GSA when feasible and economical rather than procuring new property. The eligibility of activities and organizations to obtain supplies and services through GSA's personal property utilization and disposal programs is governed by Federal Property Management Regulations, 41 CFR Parts 101-42 through 101-46, 101-48, and 101-49.
6. FEDERAL SUPPLY SCHEDULES. Use of GSA's Federal Supply Schedules is restricted to those recipients with specific legislative authority to use them, subject to the extent of GSA's authorization to do so.
 - a. Full Use of Federal Supply Schedules. In accordance with Appendix B of GSA Order ADM 4800.2E, "Eligibility to Use GSA Sources of Supply and Services," FTA recipients eligible for full use of GSA Schedules are limited to the Washington Metropolitan Area Transit Authority, the District of Columbia Department of Mass Transportation (40 U.S.C. Section 502(a)(3)., the Government of American Samoa, the Government of Guam, Virgin Islands Department of Public Works, and the Commonwealth of the Northern Marianas (48 U.S.C. Section 1469e).
 - b. Limited Use of Federal Supply Schedules. State and Local Governments (including institutions of higher education) are authorized by law to use Federal Supply Schedules to acquire information technology (IT) and to mitigate disasters. In both cases, GSA defines the term the term "State and Local Government" broadly to cover many of FTA's governmental recipients and others as follows:

"The States of the United States, counties, municipalities, cities, towns, townships, tribal governments, public authorities (including public or Indian housing agencies under the United States Housing Act of 1937), school districts, colleges, and other institutions of higher education, council of governments (incorporated or not), regional or interstate government entities, or any agency or instrumentality of the preceding entities (including any local educational agency or institution of higher education), and including legislative and judicial departments."

GSA states in its Order that the term "State and Local Government" does not include "contractors, or grantees, of State or local governments." Nevertheless, with regard to State and local government entities (including institutions of higher education) themselves receiving Federal assistance funds either as an FTA recipient or subrecipient, these entities are eligible users under the Cooperative Purchasing Program by virtue of meeting the definition of State and local government entities; the source of funding for these entities is irrelevant.

- (1) Information Technology. In accordance with Section 211 of the E Government Act of 2002, 40 U.S.C. Section 502(c), “State and local governments” are eligible, within limits established by law, to procure Information Technology (IT) of various types through GSA’s Cooperative Purchasing Program, Federal Supply Schedule 70. The shortcut to GSA’s website with information about cooperative purchasing is www.gsa.gov/cooperativepurchasing.
 - (2) Disaster Recovery. Since February 1, 2007, in accordance with Section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109–364, which amended 40 U.S.C. Section 502(d), State and local government entities may use any GSA Federal Supply Schedule to purchase property and services in advance of a major disaster declared by the president, as well as in the aftermath of an emergency event. State and local government entities are responsible for ensuring that the property or services purchased are to be used to facilitate recovery. More information about disaster recovery purchasing is available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?faq=yes&pageTypeId=8199&contentId=22410&contentType=GSA_OVERVIEW.
7. EXISTING CONTRACTS. Use of existing contracts may prove an advantageous means of acquiring needed property or services.
- a. Permissible Uses. The following uses of existing contracts are permitted to the extent set forth below:
 - (1) Exercise of Options. Options may be used in accordance with the following limitations:
 - (a) Consistency with the Contract. A recipient must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract awarded.
 - (b) Price. An option may not be exercised unless the recipient has determined that the option price is better than prices available in the market or that the option is the more advantageous offer at the time the option is exercised.
 - (c) Awards Treated as Sole Source Procurements. The following actions constitute sole source awards:
 - 1 Failure to Evaluate the Options Before Awarding the Underlying Contract. When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement.
 - 2 Negotiating a Lower Option Price. Exercising an option after a lower price has been negotiated also constitutes a sole source procurement.

An award described above can only be permissible if it can be justified under FTA's third party contract standards for sole source awards.

- (2) Assignment of Rights. Although FTA does not encourage the practice, a recipient may assign its contractual rights to purchase property and services to other recipients if the original contract contains an appropriate assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, competed, evaluated, and awarded, or other appropriate assignment provisions. Some refer to this process as "piggybacking." As discussed more fully in Section 7.b of this chapter, the recipient must assure that the entity from which it intends to acquire contractual rights to purchase property or services has not improperly expanded the quantity of property or services to be delivered under its contract beyond the scope of that contract's limits. For example, if the supplies or services were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and maximum quantity that represent the reasonably foreseeable needs of the party(s) to the solicitation and contract.

An FTA recipient that obtains these contractual rights through assignment may exercise them after first determining the contract price remains fair and reasonable, and all Federal requirements have been addressed in the contract's clauses. The recipient is not required to perform a second price analysis if a price analysis was originally performed. However, the recipient must determine the contract price or prices originally established are still fair and reasonable. See, Appendix B.16 of FTA's "Best Practices Procurement Manual" for use in connection with decisions to enter into procurements through assignment of another's contract rights. The recipient is responsible for Buy America compliance with the transaction and assuring that they execute all of the required pre-award and post-delivery Buy America audit certifications. For further detail please refer to FTA's Pre-Award and Post-Delivery Handbooks for buses and rail cars which contain copies of the certifications to be executed

FTA recommends that recipients consider combining efforts in their procurements to obtain better pricing through larger purchases. Some refer to this process as "pooling." Joint procurements or cooperative procurements offer the additional advantage of being able to obtain goods and services that exactly match each cooperating recipient's requirements. FTA considers joint procurements or cooperative procurements to be better than procurements through assignments because assignments do not combine buying power when prices are negotiated and may limit a recipient's choices to that property and services excess to another recipient's needs. FTA cautions, however, that if two or more parties jointly solicit and award an IDIQ contract, then there must be a total minimum and maximum.

Given the opportunities for joint procurements, inter-governmental procurements, and other innovative means of obtaining goods and services, the recipient should pay renewed attention to its procurement practices to ensure that it contracts only for its reasonably anticipated needs and does not build excess capacity into its contracts simply for the purpose of assigning rights to others at a later date.

- b. Impermissible Uses. A contract improperly expanded beyond its original scope may not be used to support federally-assisted acquisitions. The following actions are prohibited:
- (1) Improperly Expanded Scope. A recipient may not use Federal assistance to acquire property or services through another contract whose scope has been improperly expanded. FTA believes it is extremely important that the recipient ensure that it contracts only for its reasonably anticipated needs and does not add quantities or options to contracts solely to allow it to assign those quantities or options at a later date.
 - (2) Improperly Expanded Quantity. A recipient may not expand the quantity of property or services to be delivered under its contract beyond the scope of the contract's limits solely to assign those contract rights to another entity.

FTA considers an addition of work (property or services) that is beyond the scope of the original contract to constitute a cardinal change. Such practices are sometimes informally referred to as "tag-ons." Changes within the scope of the contract ("in-scope" changes) are not "tag-ons."

FTA takes the position that earlier attempts to categorize virtually any change in quantity as a prohibited out-of-scope change failed to account for the realities of the marketplace and unnecessarily limited a recipient from exercising reasonable freedom to make those minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract. FTA's policy is supported by the U.S. Supreme Court decision in *Freund v. United States*, 260 U.S. 60 (1922).

FTA recognizes that determining a "cardinal change" to a third party contract can be difficult. A cardinal change cannot be identified easily by assigning a specific percentage, dollar value, number of changes, or other objective measure that would apply to all cases. Among other things, customary marketing practices can influence the determination of which changes would be "cardinal."

Before attempting any change in quantity of major items (e.g., buses, rail cars), grantees should review their contract clauses to ensure they allow for such changes. In the case of rolling stock, a change in quantity or a substitution of major end items not contemplated in the original competition is an out-of-scope change. FTA also considers an out-of-scope change would include changing the engine, or changing from a high to a low floor vehicle. FTA, however, considers changes to seating fabrics and colors, exterior paint schemes, signage, and floor coloring, and other similar changes to be permissible "in-scope" changes.

FTA has not developed a finite list of acceptable changes and instead advises recipients to look to the broader standards applied in Federal contracting practice as reflected in Boards of Contract Appeals, Federal courts, and Comptroller General decisions to determine whether what they are trying to do is “in-scope.” FTA does not imply that these Federal procurement decisions are controlling. FTA intends to consider the collective wisdom within these decisions in judging where changes in a third party contract falls along the broad spectrum between clearly an in-scope change and clearly out-of-scope change. FTA intends to monitor its recipients and oversight contractors to ensure this concept is well understood and uniformly applied, and to issue additional guidance as necessary to assist the recipient in exercising this authority. This approach permits greater latitude but, because it requires analysis, it can sometimes require a greater knowledge of Federal contracting practice.

8. THE OPEN MARKET. Most likely the vast majority of a recipient’s acquisitions will be through procurements in the open market. The next two chapters of this circular will address proper procedures for conducting and administering such procurements.

CHAPTER VI

PROCEDURAL GUIDANCE FOR OPEN MARKET PROCUREMENTS

1. **COMPETITION REQUIRED.** Except as permitted by Federal law or regulations, the Common Grant Rules require third party procurement transactions to be conducted in a manner providing open competition. This is reinforced by 49 U.S.C. Section 5325(a), which requires a Federal Transit Administration (FTA) recipient to conduct all third party procurement transactions financed under 49 U.S.C. Chapter 53 in a manner that provides full and open competition as determined by FTA. Awards may be made on the basis of:
 - a. **Solicitation by the Recipient.** Compliance with the solicitation procedures described in this chapter will fulfill FTA requirements for “full and open competition.”
 - b. **Unsolicited Proposals.** A recipient may also enter into contracts resulting from the receipt of unsolicited proposals when authorized by applicable State or local law or regulation. Such contractual actions will satisfy the requirement for full and open competition if, before entering into the contract, the recipient publicizes its intent to accept the unsolicited proposal and provides an opportunity for interested parties to comment or submit competing proposals.
2. **SOLICITATION REQUIREMENTS AND RESTRICTIONS.** The Common Grant Rules require that each solicitation provide for the following:
 - a. **Description of the Property or Services.** A clear and accurate description of the technical requirements for the property or services to be procured must be set forth in the solicitation and in the resulting contract.
 - (1) **What to Include.** The description may include a statement of the qualitative nature of the property or services to be procured. Whenever practicable, the description should express requirements in terms of functions to be performed or the level of performance required, including the range of acceptable characteristics or minimum acceptable standards. Detailed technical specifications should be avoided if at all possible in favor of performance specifications.
 - (2) **Quantities Limited to the Recipient’s Actual Needs.** FTA restricts Federal assistance to the acquisition of that amount of property and services expected to meet, but not exceed, the recipient’s actual needs at the time of acquisition. FTA will not knowingly participate in the cost of excess property or services merely to permit assignment of rights to others.
 - (3) **Brand Name or Equal.** When it is impractical or uneconomical to make a clear and accurate description of the technical requirements of the property the recipients seeks to acquire, a “brand name or equal” description may be used as a means to define the performance or other salient characteristics of a specific type of property. The recipient, however, must state the salient characteristics of the

named brand that offerors must provide. When using a “brand name” specification, the recipient need not attempt to reverse-engineer a complicated part to discern precise measurements or specifications in order to describe its salient characteristics. FTA’s “Best Practices Procurement Manual,” contains guidance on preparation of specifications including examples with specific language.

- (4) Prohibitions. The Common Grant Rules prohibit solicitation requirements that contain features that unduly restrict competition. FTA is also prohibited by 49 U.S.C. Section 5325(h) from using Federal funds to support an exclusionary or discriminatory specification.

Examples of such requirements appear in one or both Common Grant Rules and include, but are not limited to, the following:

- (a) Excessive Qualifications. Unreasonable requirements placed on bidders or offerors in order for them to qualify to do business.
- (b) Unnecessary Experience. Unnecessary experience requirements.
- (c) Improper Prequalification. Use of prequalification procedures that do not meet the standards described below in this Chapter VII, Subsection 1.d.
- (d) Retainers. Making noncompetitive awards without further justification to any person or firm on a retainer contract with the recipient or subrecipient.
- (e) Excessive Bonding. Imposing excessive bonding requirements. Notably, FTA does not require any bonding for rolling stock, services, maintenance operations, or any contracts other than construction as explained previously in Chapter IV.
- (f) Brand Name Only. Specifying only a “brand name” product instead of allowing an “or equal” product to be offered or failing to specify the brand name product’s salient characteristics.
- (g) In-State or Local Geographic Restrictions. Specifying statutorily or administratively imposed in-State or local geographical preferences or evaluating bids and proposals in light of such in-State or local geographic preferences. Specifically, an FTA recipient is prohibited by 49 U.S.C. Section 5325(i) from limiting their bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following:
 - 1 Architecture and Engineering Services. Geographic location may be a selection criteria provided an appropriate number of qualified firms are eligible to compete for the contract, given the nature and size of the project.

- 2 Licensing. State licensing laws may be enforced.
 - 3 Disaster Projects. With respect to Stafford Act funding, 42 U.S.C. Section 5150 provides a preference to firms and individuals located in the area affected by a major disaster or emergency for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities.
- (h) Organizational Conflict of Interest. An organizational conflict of interest can result in unfair competitive situations:
- 1 Occurrence. An organizational conflict of interest occurs when any of the following circumstances arise:
 - a Lack of Impartiality. When the contractor is unable, or potentially unable, to render impartial assistance or advice to the recipient due to other activities, relationships, contracts, or other circumstances.
 - b Impaired Objectivity. When the contractor's objectivity in performing the contract work is or might be otherwise impaired due to other activities, relationships, contracts, or other circumstances.
 - c Unfair Competitive Advantage. The contractor has an unfair competitive advantage.
 - 2 Remedy. Separation of Functions is one means to remedy organizational conflicts of interest. For example, a contractor that develops or drafts specifications, plans, requirements, statements of work, invitations for bids and/or requests for proposals should be excluded from competing for contract awards of the execution of the work, except if the contractor is participating in a consortia, joint venture, or other innovative contractual arrangement in which the recipient contemplates award of both development and execution functions to the same entity.
- (i) Restraint of Trade. Engaging in noncompetitive pricing practices between firms or between affiliated companies.
- (j) Arbitrary Action. Taking any arbitrary action in the procurement process.
- b. Other Federal Requirements Affecting the Property or Services to be Acquired. Identify those Federal requirements that will impact contract scope and performance. See, Chapter IV, Section 2.b of this circular, and the latest FTA Master Agreement that may contain additional requirements.
 - c. Other Federal Requirements Affecting the Bidder/Offeror and Contractor. Identify all Federal requirements that a bidder or offeror must fulfill before and during contract

performance. See, Chapter IV, Section 2.a of this circular. The latest FTA Master Agreement may also contain additional requirements.

- d. Prequalification. Prequalification lists are most commonly used for recurring requirements for property that take a good deal of time to evaluate to determine if they satisfy the recipient's standards. A recipient may prequalify people, firms, or products for participation in its procurements provided that:
 - (1) Lists. The recipient ensures that all its prequalification lists used in acquiring property and services are current.
 - (2) Sources. The recipient ensures that all its prequalification lists include enough qualified sources to ensure maximum full and open competition.
 - (3) Qualification Periods. The recipient permits potential bidders or proposers to qualify during the solicitation period (from the issuance of the solicitation to its closing date), as set forth in the Common Grant Rule for governmental recipients. Evaluations for prequalification, however, need not be accelerated or truncated. FTA does not require a recipient to hold a particular solicitation open to accommodate a potential bidder or proposer that submits a person, firm, or product for approval before or during that solicitation. Prequalification as discussed here should not be confused with reviews of technical qualifications that are an essential step in two-step procurement processes, as discussed further in Section 3.g of this chapter of the circular.
 - e. Evaluation Factors. Identify all factors to be used in evaluating bids or proposals.
3. METHODS OF PROCUREMENT. The recipient is expected to use the competitive procedure(s) best suited to the circumstances of the contract action sought and consistent with the need to fulfill its requirements efficiently. FTA has established the following standards for various procurement methods, based on requirements of the Common Grant Rules and supplemented by FTA policies that address the needs of FTA recipients.
- a. Micro-Purchases. Consistent with the FAR, FTA considers micro-purchases to be those purchases of \$3,000 or less. (However, Davis-Bacon prevailing wage and hour restrictions apply to construction contracts exceeding \$2,000.)

FTA permits purchases below these thresholds to be made without obtaining competitive quotations and those purchases are exempt from Buy America requirements. FTA cautions, however, that there should be equitable distribution among qualified suppliers and no splitting of procurements to avoid competition.

FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how this determination was arrived at. The rationale for the procurement method, selection of contract type, and reasons for contractor selection or rejection are not required. Micro-purchases may be documented

through various means. One, but not the only, method is for the official tasked to review and authorize payment of a credit card bill to add a statement to that bill such as “I have examined the expenditures reflected in this bill and determined that each expenditure reflects a reasonable price based on market prices offered by the vendors to the general public.” A statement as described may then be added by: (1) stapling a preprinted sheet to the bill, (2) stamping the bill with a rubber stamp imprinting the statement, or (3) even asking the credit card provider to print an appropriate statement on each bill that the reviewing official may sign.

This is not intended to imply that any purchase under \$3,000 must be treated as a micro-purchase. A recipient remains free to set lower thresholds as it deems fit for this procurement method.

- b. Small Purchases. The Common Grant Rule for governmental recipients defines small purchase procedures as those relatively simple and informal procurement methods for securing services, supplies, or other property that cost more than the micro-purchase threshold but do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. Section 403(11) (currently \$100,000). If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources. This is not intended to imply that any purchase under \$100,000 must be treated as a small purchase. The recipient remains free to set lower thresholds as it deems fit for this procurement method.
- c. Sealed Bids (Formal Advertising). The Common Grant Rule for governmental recipients identifies Sealed Bidding as a procurement method in which bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.
 - (1) When Appropriate. The sealed bid method of procurement is the preferred method for procuring construction and other property, if the factors below are present. In order for sealed bidding to be feasible, the following conditions should be present:
 - (a) Specifications. A complete, adequate, and realistic specification or purchase description is available;
 - (b) Adequate Sources. Two or more responsible bidders are willing and able to compete effectively for the business;
 - (c) Firm Fixed Price Contract. The procurement lends itself to a firm fixed price contract;
 - (d) Price. The selection of the successful bidder can be made on the basis of price and those price-related factors included in the solicitation; and
 - (e) Discussions. No discussion with bidders is needed.

- (2) Procurement Requirements. If this procurement method is used, the following requirements apply:
 - (a) Publicity. The invitation for bids will be publicly advertised;
 - (b) Adequate Sources. Bids shall be solicited from an adequate number of known suppliers, providing them sufficient time to prepare bids prior to the date set for opening the bids;
 - (c) Specifications. The invitation for bids, which will include any specifications and pertinent attachments, shall describe the items or services sought in order for the bidder to properly respond;
 - (d) Public Opening. All bids will be publicly opened at the time and place prescribed in the invitation for bids;
 - (e) Firm Fixed Price Contract. A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest; payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
 - (f) Rejection of Bids. Any or all bids may be rejected if there is a sound, documented business reason.
- d. Competitive Proposals/Request for Proposals (RFP). Competitive Proposals is a procurement method normally conducted with more than one source submitting an offer, or proposal.
 - (1) When Appropriate. This method of procurement is generally used when conditions are not appropriate for the use of sealed bids. Competitive proposals should be used when:
 - (a) Specifications. Adequate specifications or descriptions are not available;
 - (b) Adequate Sources. It is uncertain whether more than one offeror will submit a proposal;
 - (c) Price. Due to the nature of the procurement, award should not be based exclusively on price or price-related factors;
 - (d) Discussions. Discussions with the offeror(s) are likely to be needed.
 - (2) Procurement Requirements. If this procurement method is used, the following requirements apply:

- (a) Publicity. Requests for proposals will be publicized;
 - (b) Evaluation Factors. All evaluation factors will be identified in the procurement documents along with their relative importance; numerical or percentage ratings or weights, however, need not be disclosed in the solicitation;
 - (c) Adequate Sources. Proposals will be solicited from an adequate number of qualified sources;
 - (d) Evaluation Method. The recipient will have a method in place for conducting technical evaluations of the proposals received and for selecting awardees;
 - (e) Price. Award will be made to the responsible firm whose proposal is most advantageous to the recipient's program with price and other factors considered; and
 - (f) Value. In determining which proposal is most advantageous, a recipient may award (if consistent with State law) to the offeror whose proposal offers the greatest value to the recipient. This decision should be based upon an analysis of a tradeoff of qualitative technical factors and price/cost to decide which proposal represents the "best value" to the recipient's public transportation project as defined in Chapter I, Section 4 of this circular. Apart from the statutory requirement that factors used must support the purposes of the Federal transit laws at 49 U.S.C. Chapter 53, FTA does not wish to dictate any particular factors or analytic process. Solicitations must, of course, inform potential offerors that the award will be made on a "best value" basis and what the basis for award will be.
- e. Architectural and Engineering Services (A&E) and Other Services. FTA's enabling legislation at 49 U.S.C. Section 5325(b)(1) requires the use of qualifications based competitive proposal procedures as set forth in the "Brooks Act," 40 U.S.C. Sections 1101 1104.
- (1) When Required. Qualifications-based competitive proposal procedures are required for projects related to or leading to a construction project. These procedures must be used not only when contracting for architectural and engineering services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services.
 - (2) When Prohibited. Qualifications based competitive proposal procedures described below can only be used for the procurement of the services such as program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services if those services to be provided relate to or lead to a construction project. Unless FTA determines otherwise in writing, these qualifications based

procurement procedures may not be used to obtain other types of services if those services are not related to or do not lead to a construction project, even if those services would be provided by a firm that also provides architectural and engineering services.

- (3) Qualifications-Based Proposal Requirements. When this procurement method is used, the following requirements apply:
 - (a) Qualifications. An offeror's qualifications must be evaluated;
 - (b) Price. Price is excluded as an evaluation factor;
 - (c) Most Qualified. Negotiations are conducted with only the most qualified offeror; and
 - (d) Next Most Qualified. Failing agreement on price, negotiations with the next most qualified offeror and, if necessary, negotiations with successive offerors in descending order must be conducted until a contract award can be made to the offeror whose price the recipient believes is fair and reasonable.
- (4) Effect of State Laws. To the extent that a State has, prior to August 10, 2005, adopted by law, an equivalent State qualifications-based requirement for contracting for architectural, engineering, and design services, Federal "Brooks Act" procedures, 40 U.S.C. Sections 1101–1104, will not apply.
- (5) Audits and Indirect Costs. As required by 49 U.S.C. Section 5325(b)(3), the recipient must comply with the following requirements when awarding a contract for program management, architectural engineering, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services:
 - (a) Performance of Audits. Any contract or subcontract shall be performed and audited in compliance with FAR Part 31 cost principles.
 - (b) Indirect Cost Rates. The recipient and third party contractor and its subcontractors shall accept indirect cost rates established in accordance with the FAR for one year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.
 - (c) Application of Rates. After a firm's indirect cost rates are accepted under subparagraph (b), the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and shall not be limited by administrative or de facto ceilings.

- (d) Prenotification; Confidentiality of Data. A recipient requesting or using the cost and rate data described in subparagraph (c) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided by the group of agencies sharing cost data under this subparagraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.
- f. Design-Bid-Build. This procurement method is used when the recipient chooses to contract separately for design and construction of its project. Design services must be procured by qualifications based methods, and construction services may be procured services through sealed bidding or competitive negotiations. Design and construction services must be procured in a manner that conforms to applicable State and local law, the requirements of this circular relative to the method of procurement used, and all other applicable Federal requirements.
- g. Design-Build. This procurement method is used when the recipient seeks to award the contract to a single contractor that will be responsible for both the project's design and construction. SAFETEA-LU expressly authorizes the use of FTA capital assistance to support design-build projects "after the recipient complies with Government requirements." 49 U.S.C. Section 5325(d)(2).

An FTA recipient must procure design-build services through means of qualifications based competitive proposal procedures based on the Brooks Act as set forth in Chapter V, Subsection 3.e of the circular when the preponderance of the work to be performed is considered to be for architectural and engineering program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related A&E services. Except to the extent FTA determines otherwise in writing, qualifications based competitive proposal procedures may not be used to procure design-build services when the preponderance of the work to be performed are services other than those listed in the previous sentence, unless required by State law. Specifically, except to the extent FTA determines otherwise in writing, qualifications based competitive proposal procedures may not be used to acquire other types of services even though a firm that provides A&E services is also a potential source to perform other types of services.

Consequently, the recipient should determine which portion of the work is predominant and use the appropriate method for that type of procurement. We would normally expect the construction portion of a design-build procurement to be predominant and, in that case, normal procurement methods may be used in lieu of qualification-based competitive proposals (the Brooks Act method).

In the alternative, Federal law at 41 U.S.C. Section 253m permits the Government to use a two-phase selection procedure for large design-build projects. FTA takes the position that the recipient may also use that procedure. Essentially, the two-phase selection procedure allows the contracting officer to solicit proposals for design-build

projects in two steps, the first a review of technical qualifications and technical approach to the project and the second a complete proposal including price. This allows the contracting officer to narrow the competitive range in the first step without a requirement for extensive proposal review on the government's part or expensive proposal drafting on potential contractors' parts. This two-phase selection procedure is separate and distinct from prequalification and is but one method a recipient may use in their procurements.

- h. Other Than Full and Open Competition. Normally, the recipient shall provide for full and open competition in soliciting offers and awarding contracts. However, the Common Grant Rule for governmental recipients acknowledges that under certain circumstances, a recipient will be permitted to contract without providing for full and open competition.
 - (1) When Appropriate. Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:
 - (a) Inadequate Competition. After solicitation of a number of sources, competition is determined inadequate. Before competition may be determined inadequate, however, the recipient is expected to review its specifications to determine if they were unduly restrictive or whether there were other reasons the recipient could remedy to encourage submission or additional bids or proposals.
 - (b) Sole Source. When the supplies or services required by the recipient are available from only one responsible source, and no other type of supplies or services will satisfy the recipient's requirements.
 - 1 Unique Capability and Availability.
 - 2 Single Bid. As discussed above, upon receiving a single bid or proposal in response to a solicitation, the recipient should determine if competition was adequate. This determination may include a review of the specifications to determine if they were unduly restrictive or a review of contacting sources that chose not to submit a bid or offer. The mere fact that only one bid or proposal was received does not automatically mean competition was inadequate since many unrelated factors could cause potential sources not to submit a bid or proposal. It is only if the recipient determines that competition was inadequate because prospective contractors chose not to participate for reasons beyond the recipient's control that the procurement should continue as a sole source procurement.

- (c) Unusual and Compelling Urgency. When the recipient's need for the supplies or services is of such an unusual and compelling urgency that the recipient would be seriously injured unless the recipient is permitted to limit the number of sources from which it solicits bids or proposals, or when the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.
- (d) Authorized by FTA. The Common Grant Rule provides Federal agencies the authority to permit a recipient to use noncompetitive proposals. Under this authority, FTA has made the following determinations:
 - 1 Joint Partnership, Joint Venture, Consortia,—Research. In the case of a grant agreement or cooperative agreement with a joint partnership, joint venture, or consortia, or a research project in which FTA has full knowledge of a particular firm or combination of firms as participants or third party contractors, the grant agreement or cooperative agreement constitutes approval of arrangements in which participants were not selected through full and open competition.
 - 2 FAR Standards. To ensure that the recipient has flexibility equal to that of Federal contracting officers, FTA authorizes procurement by noncompetitive proposals in all of the circumstances authorized by FAR Part 6.3. In addition to circumstances discussed in the Common Grant Rule, the FAR recognizes the following circumstances justify less than full and open competitive procurements:
 - a Statutory Authorization or Requirement. FTA's enabling legislation has not yet specified third party contracting with specific entities. Specific statutory requirements, however, have been included in DOT appropriations acts with the result that only a single contractor is able to perform the contract.
 - b National Emergency. To maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization.
 - c Research. To establish or maintain an essential engineering, research, or development capability to be provided by an educational or other non-profit institution or a federally-funded research and development center.
 - d Disputes/Litigation. To acquire the services of an expert or neutral person for any current or anticipated litigation or dispute.
 - e International Arrangements. When precluded by the terms of an international agreement or a treaty between the United States and a

foreign government or international organization, or the written directions of a foreign government reimbursing the recipient for the cost of the acquisition of the supplies or services for such government.

- f National Security. When the disclosure of the recipient's needs would compromise the national security.
- g Public Interest. When the recipient determines that it is not in the public interest in the particular acquisition concerned.

(2) When Prohibited. Less than full and open completion is not justified on the basis of—

- (a) Failure to Plan. The recipient's lack of advance planning; or
- (b) Limited Funding Availability. Concerns related to the amount of funds available (e.g., funds will expire) for the property or services.

(3) Required Procedures.

- (a) Limited Sources. When not providing for full and open competition, the recipient shall solicit offers from as many potential sources as is practicable under the circumstances.
- (b) Sole Source. Procurements are accomplished through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.
- (c) Change Order. A contract change that is not within the scope of the original contract is considered a sole source procurement that must comply with this subparagraph.

4. PROHIBITED/RESTRICTED CONTRACT TYPES. The Common Grant Rule for governmental recipients provides more guidance on contract type than the Common Grant Rule for non-governmental recipients, which merely states that the recipient determines the type of contract to be used (e.g. fixed price, cost reimbursement, purchase order, and incentive contract) but requires that it be appropriate for the particular procurement and promote the best interest of the program or project involved. For these reasons, FTA recommends that non-governmental recipients adhere to standards for governmental recipients to the extent feasible. Special attention is required as explained below.

- a. Cost Plus a Percentage of Cost Prohibited. The Common Grant Rules expressly prohibit the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting.

- b. Time and Materials Restricted. The Common Grant Rule for governmental recipients permits the use of time and material type contracts only:
 - (1) Restricted Use. After a determination that no other type of contract is suitable; and
 - (2) Firm Ceiling Price. If the contract specifies a ceiling price that the contractor shall not exceed except at its own risk.
- 5. ELIGIBLE COSTS. Property and services must be eligible for Federal reimbursement under the standards of the Federal Cost Principles Circular (OMB Circular A-87, OMB Circular A-21, OMB Circular A-122, or FAR Part 31) applicable to the recipient before FTA funds can be used to support their costs. Costs or prices based on estimated costs for contracts under grants or cooperative agreements will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. However, a recipient may use its own cost principles that comply with applicable Federal cost principles.
- 6. COST AND PRICE ANALYSIS. The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts surrounding the particular procurement situation, but as a starting point, the recipient must make independent estimates before receiving bids or proposals.
 - a. Cost Analysis. A cost analysis must be performed when the offeror is required to submit the elements (i.e., labor hours, overhead, materials, etc.) of the estimated cost, (e.g., under professional consulting and architectural and engineering services contracts, etc.). A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.

FTA recognizes that some recipients may have difficulty obtaining the information necessary to conduct a proper cost analysis. The requirements for cost analysis, however, are based in the Common Grant Rules and require action beyond FTA or the Department of Transportation's (DOT's) authority to change. FTA continues to seek an equitable, practical solution to this problem consistent with the flexibility Federal contracting officers enjoy under the FAR.

While Federal cost principles contain many requirements about the allowability and allocability of costs, FTA has established the following policies for determining appropriate indirect cost rates, profit, and incentive payments.

- (1) Establishing Indirect Cost Rates. If the third party contractor or subcontractor does not have an approved Government indirect cost rate agreement, FTA's position is that the dollar value of the contract should determine how that rate is verified.

- (a) Contracts of \$5 Million or Less. FTA will accept the audit recommendations of the contractor's certified public accountant, or indirect cost information in the contractor's annual statement to their stockholders, shareholders, or owners, or examples of acceptance of their rates by other government agencies within the last six months.
 - (b) Contracts Exceeding \$5 Million. If the subcontract exceeds \$5 million, then the Defense Contract Audit Agency, another Federal cognizant audit agency, or an accounting firm that has been approved to perform audits for the Federal Government will need to verify the contractor's rates.
- (2) Profit. The recipient will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases in which cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.
- (3) Incentive Payments. FTA treats as eligible costs the recipient's incentive payments to contractors that provide accurate cost and ridership estimates in connection with a new fixed guideway capital project. FTA also treats as eligible costs the recipient's incentive payments to contractors that enable a new fixed guideway capital project to be completed for less than its original estimated cost. Such incentive payments facilitate implementation of 49 U.S.C. Section 5309(l).
- b. Price Analysis. A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price. FTA takes the position that price analysis for micro-purchases may be conducted on a limited basis as discussed in Chapter VII, Section 9.a. Similarly, an abbreviated price analysis may be used for small purchases in most cases. One method to record this analysis is through use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so such as catalog or market prices offered in substantial quantities to the general public, regulated prices (e.g., for many utilities purchases), or comparison with recent prices for similar goods and services.
- c. Guidance. The following resources may be used as guidance in preparing cost or price analyses:
 - (1) FTA's "Best Practices Procurement Manual," Chapter 5,
 - (2) The National Transit Institute Course, "Cost or Price Analysis and Risk Assessment,"

- (3) Guide for FTA Grantees
[http://www.fta.dot.gov/documents/Helpline Price Guide.doc.](http://www.fta.dot.gov/documents/Helpline_Price_Guide.doc.),
- (4) FAR Part 31, Contract Cost Principles and Procedures, and
- (5) Defense Contract Audit Agency Audit Manual.

Note, however, that the requirements of FAR Part 31 and the Defense Contract Audit Agency Audit Manual may differ from restrictions applicable to an FTA recipient. Each FTA recipient must comply with those Federal laws and regulations directly applicable to it.

7. EVALUATIONS. The following standards apply:

- a. General. Bids and offers must be evaluated in accordance with the all the evaluation factors set forth in the invitation for bids or request for proposals. Only those evaluation factors that have been set forth in those procurement documents may be used to determine the award. The recipient may not modify their evaluation factors after bids or proposals have been submitted.
- b. Options. In awarding the basic contract:
 - (1) Evaluation Required. Except as provided in this Chapter VI, paragraph 7.b(2), the recipient shall evaluate offers for any option quantities or periods contained in a solicitation when it has been determined prior to soliciting offers that the recipient is likely to exercise the options.
 - (2) Evaluation Not Required. The recipient need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the recipient and this determination is approved by senior official of the recipient. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is a reasonable certainty that funds will be unavailable to permit exercise of the option.
- c. Evaluators. Many FTA recipients assign proposal evaluation and contract monitoring duties to their own auditors or financial management personnel. Those lacking qualified personnel within their organization may contract for those services. If they do so, they must comply with the procurement standards of this circular.

8. CONTRACT AWARD. The following provisions apply to third party contract awards:

- a. Award to Other Than the Lowest Bidder or Offeror. Federal transit law at 49 U.S.C. Section 5325(c) authorizes the recipient to award a contract to other than the lowest bidder if the award furthers an objective consistent with the purposes of this Chapter VI of the circular, including improved long-term operating efficiency and lower long-term costs.

- b. Award to a Responsible Contractor. SAFETEA–LU added a new subsection codified at 49 U.S.C. Section 5325(j) to strengthen the responsibility requirements of contractors participating in FTA assisted procurements. A recipient now may award a contract financed under 49 U.S.C. Chapter 53 only to a “responsible” contractor capable of successfully performing under the terms and conditions of the contract. To determine responsibility, the recipient must consider the following criteria before awarding the contract:

- (1) Integrity. The contractor’s integrity;
- (2) Public Policy. The contractor’s compliance with public policy;
- (3) Past Performance. The contractor’s past performance, including the performance reported in the Secretary of Transportation’s Contractor Performance Assessment Reports pertaining to new fixed guideway capital projects;
- (4) Financial and Technical Resources. The contractor’s financial and technical resources and;
- (5) Debarment/Suspension. Contractor’s status with respect to DOT regulations, “Governmentwide Debarment and Suspension (Nonprocurement),” 49 CFR Part 29.

In general a separate responsibility determination is made after bids and proposals have been evaluated under the factors set forth in the invitation for bids or request for proposals.

- c. Rejection of Bids and Offers.

- (1) Governmental Recipients. The Common Grant Rule for governmental recipients asserts the recipient’s right to reject all bids submitted in response to formal advertising or sealed bid procurements, even though the bidders might have had an expectation that one of them would be awarded a contract.
- (2) Non-Governmental Recipients. The Common Grant Rule for non-governmental recipients authorizes the recipient to reject any and all bids or offers when it is in the recipient’s interest to do so.

CHAPTER VII

PROTESTS, CHANGES AND MODIFICATIONS, CLAIMS, DISPUTES AND SETTLEMENTS

The Common Grant Rules specify that the recipient will be responsible in accordance with good administrative practice and sound business judgment for the settlement of all contractual and administrative issues arising out of procurements, including source evaluation and selection, including protests of awards, disputes, and claims. In addition to Common Grant Rule standards applicable to the recipient and the Federal Transit Administration (FTA), FTA encourages the recipient to use such alternative dispute resolution procedures as may be appropriate. Neither FTA nor the Common Grant Rules relieve the recipient of any responsibility under its contracts to resolve disagreements that may arise in the course of contract formation or contract administration.

In general, FTA will not substitute its judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Nevertheless, FTA can become involved in the recipient's administrative decisions when the recipient's protest decisions are challenged, and particularly when the recipient seeks to use FTA funds to support the costs it incurs when entering into settlements.

1. PROTESTS.

- a. The Recipient's Role and Responsibilities. The Common Grant Rules charge the recipient with the initial responsibility of settling protests of third party contract awards.
 - (1) Protest Procedures. In addition to other methods the recipient may have to resolve third party contract issues, such as mediation or arbitration, the Common Grant Rule for governmental recipients requires the recipient to have protest procedures to handle third party contract issues. FTA interprets this requirement to mean that all the recipient's protest procedures must be in writing. While the Common Grant Rule for non-governmental recipients does not impose a similar requirement on a non-governmental recipient, FTA expects each recipient to have appropriate protest procedures, as part of its requirement to maintain or acquire adequate technical capacity to implement the project.
 - (2) Responsibilities to FTA. The recipient's minimum responsibilities to FTA consist of the following:
 - (a) Timely Notification. The Common Grant Rule requires a governmental recipient involved in any protest to notify FTA when it receives a protest related to a third party contract to which this circular applies and to similarly keep FTA informed about the status of the protest. At any time, FTA may require the recipient to forward copies of a particular protest or all protests for

information or review purposes. A non-governmental recipient involved in protests is similarly expected to notify FTA when it receives a protest related to a third party contract to which the circular applies and to similarly keep FTA informed about the status of the protest. At a minimum, the recipient should provide informal notification to the FTA office managing the project under which the protest is taken.

- (b) Access to Information. At any time, FTA may require the recipient to provide copies of particular protest or all protests, and related supporting documents for information or review purposes. In all instances, FTA reserves the right to review the recipient's supporting documentation, and FTA expects the recipient to disclose information regarding any third party procurement protest to FTA upon FTA's request.
- b. FTA's Role and Responsibilities. FTA has established an appeals process it may use to review, in limited circumstances, protests of a recipient's procurement decisions.
- (1) Requirements for the Protester.
 - (a) Protester Must Qualify as an "Interested Party." To qualify for FTA review, the appeal must be requested by an "interested party," which is a party that is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the third party contract at issue.
 - (b) Exhaustion of Administrative Remedies. The protester must pursue and complete all administrative procedures established by the recipient to resolve the protest before appealing the recipient's decision to FTA.
 - (c) Five-Day Limit for Appeal. The cognizant FTA Office in the Region or at Headquarters must receive the protester's appeal within five working days of the date the protester has received actual or constructive notice of an adverse final decision by the recipient, or another basis of appeal to FTA has been identified, for example, if the recipient has failed to have or follow its protest procedures or has failed to review the complaint.
 - (2) Extent of FTA Review. As provided in the Common Grant Rule for governmental recipients, FTA reviews of third party contract protests will be limited.
 - (a) Procedural Failures. A recipient's failure to have or follow its protest procedures, or a recipient's failure to review a complaint or protest is grounds for FTA review; or
 - (b) Violations of Federal Law or Regulations. FTA will continue to limit its review of a recipient's protest decisions and will read this Common Grant Rule provision in conjunction with other Common Grant Rule provisions that

express FTA's intent to avoid substituting FTA's judgment for those of its recipients. FTA will not consider every appeal of a recipient's protest decision simply because a Federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those cases deemed to involve issues important to FTA's overall third party contracting program. Violations of Federal law for which FTA does not have primary jurisdiction will be referred to the Federal authority having proper jurisdiction.

- (c) Violations of State or Local Law or Regulations. Violations of State or local law will be referred to the State or local authority having proper jurisdiction.
- (3) FTA Determinations. Consistent with the Common Grant Rules, FTA will not substitute its judgment for that of the grantee or subgrantee, unless the matter is primarily a Federal concern.

Any decision by FTA to decline jurisdiction over a protest does not imply approval of or agreement with the grantee's determination or that FTA has determined the contract is eligible for Federal participation but only that FTA does not believe the issues presented are important to the overall program.

2. CHANGES AND MODIFICATIONS.

- a. The Recipient's Role and Responsibilities. The recipient is responsible for issuing, evaluating and making necessary decisions pertaining to change orders it may issue. In addition, the recipient is also responsible for evaluating and making the necessary decisions involving any constructive change order or modification it may have invoked. In general, FTA expects each recipient to comply with the following procedures:
 - (1) Approval Requirements. All change orders must be approved by the recipient's authorized officials and supported by cost justification.
 - (2) Cost Restrictions. To be eligible for funding under the recipient's grant or cooperative agreement, the cost of the modification, change order, or constructive change must be allowable, within the scope of the grant or cooperative agreement, allocable and reasonable for the completion of project scope.
- b. FTA's Role and Responsibilities. FTA does not participate in the recipient's decisions pertaining to change orders, constructive changes, or modifications, but reserves the right to review the recipient's supporting documentation.

3. CLAIMS.

- a. The Recipient's Role and Responsibilities. The Common Grant Rules charge the recipient with responsibility for evaluating and resolving third party contract claims resulting from violations, defaults, or breaches by the contractor. The recipient is also responsible for resolving any claims the contractor may present against the recipient.

In view of FTA's financial interest in the settlement of third party contract claims, the recipient must take the following actions:

- (1) Legal Rights and Remedies. The recipient must pursue all legal rights and remedies available under any third party contract.
 - (2) Notification to FTA. The recipient must notify FTA of any current or prospective litigation or major disputed claim in excess of \$100,000 relating to any third party contract. FTA reserves the right to review the recipient's supporting documentation.
- b. FTA's Role and Responsibilities. In support of its vested interest in the settlement of claims involving any federally-assisted third party contracts, FTA's financial rights are as follows:
- (1) Proceeds Recovered. FTA retains a right to a share of any net proceeds recovered through a third party contract claim, in proportion to the Federal share committed to the project.
 - (2) Liquidated Damages. If the third party contract contains a liquidated damages provision, any liquidated damages recovered must be credited to the project unless FTA permits other uses of the funds involved.

4. DISPUTES.

- a. The Recipient's Role and Responsibilities. The Common Grant Rules charge the recipient with responsibility for evaluating and resolving third party contract disputes. If the recipient intends to request FTA's permission to use Federal assistance to support payments to a third party contractor, or even intends to request increased funding for that purpose, the recipient's responsibilities are as follows:
- (1) Adequate Documentation. The recipient must adequately document in its project files all pertinent facts, events, negotiations, applicable laws, and a legal evaluation of the likelihood of success in any potential litigation proceeding. The recipient must assure that its documentation provides sufficient information to serve as the basis for FTA concurrence in the compromise or settlement of the claim, in the event that FTA review and concurrence become necessary.
 - (2) Audit. The recipient considers conducting or obtaining a formal audit to substantiate each part of a large contract dispute before entering into a settlement. In those instances, the audit should be conducted in accordance with "Generally Accepted Auditing Standards" as defined by the American Institute of Certified Public Accountants. The recipient is also encouraged to undertake an audit or similar analysis before settlement of a smaller dispute.

- (3) Notification to FTA. The recipient must provide a list of all outstanding claims exceeding \$100,000 and a list of all claims settled during the reporting period as part of each quarterly progress report. This list should be accompanied by a brief description and reasons for each claim. The recipient must notify FTA of any current or prospective litigation relating to any third party contract.
 - b. FTA's Role and Responsibilities. In general, FTA does not become involved in the negotiation of the resolution of a dispute. However, FTA does reserve the right to become involved as follows:
 - (1) Determine Reasonableness. FTA may review the reasonableness of a negotiated settlement for the purpose of determining the extent of FTA's participation in the settlement.
 - (2) Review Documents. When deemed necessary, FTA may initiate review of the recipient's claims file/history or experience under a particular grant or cooperative agreement. Claimed amounts, determined to be ineligible through subsequent audit or FTA review, if already disbursed, must be returned to FTA by the recipient. FTA reserves the right to defer participation in settlement costs until an adequate audit has been provided.
5. SETTLEMENTS, ARBITRATION DETERMINATIONS, AND COURT AWARDS—COST SHARING.
- a. The Recipient's Responsibilities.
 - (1) Maintain Sufficient Records. The recipient's claims records must be sufficient to substantiate that reasonable and prudent measures were taken to prevent or offset the causes underlying the claim to justify FTA's participation in the negotiated cost or costs imposed through binding arbitration or costs imposed by judgments rendered by Federal, State, or local courts.
 - (2) Obtain FTA Concurrence. Even when costs are assessed against the recipient through binding arbitration or court decision, the recipient must secure FTA review and its written concurrence in a proposed claim or final claim settlement before using Federal funds in the following instances:
 - (a) More Than \$100,000. When negotiated settlement exceeds \$100,000;
 - (b) Insufficient Funds. When insufficient funds remain in the approved project to cover the settlement; or
 - (c) Special Federal Interest. Where a special Federal interest is declared because of program management concerns, possible mismanagement, impropriety, waste, or fraud.

b. FTA's Prerogatives.

- (1) Review Supporting Documentation. FTA reserves the right to review the recipient's supporting documentation.
- (2) Provide Federal Assistance. Subject to availability of funds, FTA may fund a prorated share of the properly incurred, eligible costs of contractor claims that are not caused by mismanagement on the part of the recipient or attributable to the contractor.
- (3) Deny Federal Assistance. Claims that result from the recipient's negligence or error normally are not eligible for FTA participation. FTA normally will not participate in any claim settlement for which the recipient's failure involved the following:
 - (a) Right-of-Way. Failure to obtain clear access to all needed right-of-way prior to award of the construction contract;
 - (b) Utility Agreements. Failure to execute all required utility agreements in time to assure uninterrupted construction progress;
 - (c) Planning and Scheduling. Failure to undertake comprehensive project planning and scheduling to achieve proper coordination among contractors;
 - (d) Subsurface Conditions. Failure to inform potential contractors of all available geo-technical information on subsurface conditions;
 - (e) Materials Compatibility. Failure to assure that all recipient furnished materials are compatible with contractor project facilities and/or equipment and available when needed;
 - (f) Pre-Construction Survey and Engineering. Failure to complete all pre-construction survey and engineering prior to issuing the contractor a Notice to Proceed;
 - (g) Public Authority Approvals. Failure to obtain the necessary approvals and agreements from all other public authorities affected by the project prior to contract award; or
 - (h) Drawing Approvals. Failure to assure that all design and shop drawings are promptly approved and made available to the contractor as needed.

APPENDIX A

REFERENCES

1. Federal Transit Laws, Title 49, United States Code, Chapter 53; also public transportation provisions of Title 23, United States Code.
2. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, (SAFETEA-LU) (Pub. L. 109–59).
3. Transportation Equity Act for the 21st Century 1998 (TEA–21), P.L. 105–178 as amended by TEA–21 Restoration Act 1998, P.L. 105–206.
4. 7 U.S.C. Sections 2131 et seq.—Animal Protections.
5. 15 U.S.C. Sections 205a et seq.—Metric Usage.
6. 18 U.S.C. Section 874—Anti Kickback.
7. 23 U.S.C. Section 512 note—Intelligent Transportation Systems.
8. 29 U.S.C. Section 794—Nondiscrimination on the Basis of Disability.
9. 29 U.S.C. Section 794d—Information Accessibility.
10. 31 U.S.C. Section 1352—Lobbying.
11. 31 U.S.C. Section 5112(p) – Section 104 of the Presidential \$1 Coin Act of 2005
12. 31 U.S.C. Sections 7501 et seq.—Single Audit.
13. 33 U.S.C. Sections 1251 through 1377—Clean Water.
14. 35 U.S.C. Sections 200 et seq.—Patent Rights.
15. 40 U.S.C. Section 502(a)(3)—GSA Schedule Use by the District of Columbia.
16. 40 U.S.C. Section 502(c)—GSA Schedule Use for Information Technology.
17. 40 U.S.C. Section 502(d)—GSA Schedule Use for Disaster Relief.
18. 40 U.S.C. Chapter 11—Architectural/Engineering Procurement Requirements.
19. 40 U.S.C. Sections 3141 et seq.—Prevailing Wages.
20. 40 U.S.C. Section 3702—Wage and Hour Restrictions.

21. 40 U.S.C. Section 3704—Construction Safety.
22. 41 U.S.C. Section 253m—Federal Design-Build Two Step Procurement Process.
23. 41 U.S.C. Section 403(11)—Federal Simplified Acquisition Threshold.
24. 42 U.S.C. Sections 289 et seq.—Protection of Humans.
25. 42 U.S.C. Section 2000e et seq.—Equal Employment Opportunity.
26. 42 U.S.C. Section 5150—Disaster Relief.
27. 42 U.S.C. Sections 6321 et seq.—Energy Conservation.
28. 42 U.S.C. Section 6962—Resource Conservation and Recovery.
29. 42 U.S.C. Sections 7401 through 7671q—Clean Air.
30. 42 U.S.C. Sections 7701 et seq.—Seismic Safety.
31. 42 U.S.C. Sections 12101 et seq.—Accessibility for Persons with Disabilities.
32. 46 U.S.C. Section 55305—Cargo Preference.
33. 48 U.S.C. Section 1469e—Use of GSA Supply Schedules by Insular Areas.
34. 49 U.S.C. Section 114(s)—Sensitive Security Information.
35. 49 U.S.C. Section 40118—Fly America.
36. 49 U.S.C. Section 40119(b)—Sensitive Security Information.
37. Subsection 7101(a) of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103–355, October 13, 1994—Repeal of Labor Surplus Area Programs.
38. Department of Transportation (DOT) regulations, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 CFR Part 18.
39. DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR Part 19.
40. DOT regulations, “Protection of Human Subjects,” 49 CFR Part 11.
41. DOT regulations, “Protection of Sensitive Security Information,” 49 CFR Part 15.
42. DOT regulations, “New Restrictions on Lobbying,” 49 CFR Part 20.

43. DOT regulations, “Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs,” 49 CFR Part 24.
44. DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26.
45. DOT regulations, “Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 CFR Part 27.
46. DOT regulations, “Government Wide Debarment and Suspension (Nonprocurement),” 49 CFR Part 29.
47. DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37.
48. Joint ATBCB/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.
49. DOT regulations, “Seismic Safety,” 49 CFR Part 41 at Sections 41.117 and 41.120.
50. Federal Transit Administration (FTA) regulations, “Charter Service,” 49 CFR Part 604.
51. FTA regulations, “School Bus Operations,” 49 CFR Part 605.
52. FTA regulations, “Capital Leases,” 49 CFR Part 639.
53. FTA regulations, “Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations,” 49 CFR Part 655.
54. FTA regulations, “Buy America,” 49 CFR Part 661.
55. FTA regulations, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” 49 CFR Part 663.
56. FTA regulations, “Bus Testing,” 49 CFR Part 665.
57. Federal Acquisition Regulation (FAR), 48 CFR Chapter 1.
58. FAR Part 6.3, 48 CFR Chapter 1, Subpart 6.3 (Federal Procurement by Noncompetitive Proposals).
59. FAR Subparts 25.1 and 25.2, 48 CFR Chapter 1, Subparts 25.1 and 25.2 (Federal Buy American Regulations).
60. FAR Part 31, 48 CFR Chapter 1, Part 31 (Federal Cost Principles).

61. FAR Subpart 31.2, 48 CFR Chapter 1, Subpart 31.2 (Contracts with Commercial Organizations).
62. Department of Homeland Security regulations, “Protection of Sensitive Security Information,” 49 CFR Part 1520.
63. Department of Labor (DOL) regulations, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States,” 29 CFR Part 3.
64. DOL regulations, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act),” 29 CFR Part 5.
65. DOL guidelines, “Section 5333(b), Federal Transit Law,” 29 CFR Part 215.
66. DOL regulations, “Safety and Health Regulations for Construction,” 29 CFR Part 1926.
67. Department of Agriculture regulations, “Animal Welfare,” 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
68. Department of the Treasury regulations, “Surety Companies Doing Business with the United States,” 31 CFR Part 223.
69. Architectural and Transportation Barriers Compliance Board (ATBCB) regulations, “Electronic and Information Technology Accessibility Standards,” 36 CFR Part 1194.
70. Department of Commerce regulations, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms,” 37 CFR Part 401.
71. Environmental Protection Agency regulations, “Comprehensive Procurement Guidelines for Products Containing Recovered Materials,” 40 CFR Part 247.
72. Council on Environmental Quality regulations, “Other Requirements of NEPA,” 40 CFR Part 1506.
73. General Services Administration (GSA), Federal Property Management Regulations, 41 CFR Parts 101–42 through 101–46, and 101–48, 101–49.
74. GSA regulations, “Use of United States Flag Air Carriers,” 41 CFR Sections 301–10.131 through 301–10.143.
75. Maritime Administration regulations, “Cargo Preference U.S. Flag Vessels,” 46 CFR Part 381.

76. Executive Order No. 12770, “Metric Usage in Federal Government Programs,” 15 U.S.C. Section 205a note.
77. Executive Order No. 13202, “Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects,” 02–17–2001, as amended by Executive Order No. 13208, 04–06–2001, 41 U.S.C. Section 251 note.
78. Executive Order No.13132, “Federalism,” 08–04–1999, 5 U.S.C. Section 601 note.
79. Executive Order No. 13043, “Increasing Seat Belt Use in the United States,” 04–16–1997, 23 U.S.C. Section 402 note.
80. OMB Guidance for Grants and Agreements, “Cost Principles for Educational Institutions (OMB Circular A–21),” 2 CFR Part 220.
81. OMB Guidance for Grants and Agreements, “Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87),” 2 CFR Part 225.
82. OMB Guidance for Grants and Agreements “Cost Principles for Non-profit Organizations (OMB Circular A–122),” 2 CFR Part 230.
83. OMB Circular A–133, “Audits of States, Local Governments, and Non-Profit Organizations,” as revised.
84. GSA Order ADM 4800.2E, “Eligibility to Use GSA Sources of Supply and Services.”
85. FTA Circular 5010.1C, “Grant Management Guidelines,” 10–01–98.
86. FTA Circular 9030.1C, “Urbanized Area Formula Program: Grant Application Instructions,,” 10-01–98.
87. FTA Circular 9300.1A, “Capital Program: Grant Application Instructions,,” 10–01–98.
88. FTA Circular 9400.1A, “Federal Transit Administration Design and Art in Transit Projects,,” 06–09–95.
89. FTA Master Agreement [PDF].
90. FTA “Best Practices Procurement Manual.”

APPENDIX B

FTA REGIONAL AND METROPOLITAN CONTACT INFORMATION

Office	Area Served	Contact Information
Region I	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont	Transportation Systems Center Kendall Square 55 Broadway, Suite 920 Cambridge, MA 02142-1093 Phone: 617-494-2055 Fax: 617-494-2865
Region II	New York and New Jersey	One Bowling Green Room 429 New York, NY 10004-1415 Phone: 212-668-2170 Fax: 212-668-2136
Region III	Delaware, District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia	1760 Market Street Suite 500 Philadelphia, PA 19103-4124 Phone: 215-656-7100 Fax: 215-656-7260
Region IV	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and U.S. Virgin Islands	230 Peachtree St., N.W. Suite 800 Atlanta, GA 30303 Phone: 404-865-5600 Fax: 404-865-5605
Region V	Illinois, Indiana, Minnesota, Michigan, Ohio, and Wisconsin	200 West Adams Street Suite 320 Chicago, IL 60606 Phone: 312-353-2789 Fax: 312-886-0351
Region VI	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas	819 Taylor Street Room 8A36 Forth Worth, TX 76102 Phone: 817-978-0550 Fax: 817-978-0575
Region VII	Iowa, Kansas, Missouri, and Nebraska	901 Locust, Suite 404 Kansas City, MO 64106 Phone: 816-329-3920 Fax: 816-329-3921

Office	Area Served	Contact Information
Region VIII	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming	12300 W Dakota Avenue Suite 310 Lakewood, CO 80228-2583 Phone: 720-963-3300 Fax: 720-963-3333
Region IX	Arizona, California, Hawaii, Nevada, Guam, American Samoa, and Northern Mariana Islands	201 Mission Street Room 1650 San Francisco, CA 94105-1839 Phone: 415-744-3133 Fax: 415-744-2726
Region X	Alaska, Washington, Oregon, and Idaho	915 Second Avenue, Suite 3142 Seattle, WA 98174-1002 Phone: 206-220-7954 Fax: 206-220-7959
Lower Manhattan Recovery Office	Lower Manhattan	1 Bowling Green, Room 436 New York, NY 10004 Phone: 212-668-1770 Fax: 212-668-2505
New York Metropolitan Office	New York Metropolitan Area	One Bowling Green, Room 428 New York, NY 10004-1415 Phone: 212-668-2201 Fax: 212-668-2136
Chicago Metropolitan Office	Chicago Metropolitan Area	200 West Adams Street Suite 2410 Chicago, IL 60606 Telephone: 312-886-1616 Fax: 312-886-0351
Los Angeles Metropolitan Area	Los Angeles Metropolitan Area	888 S. Figueroa, Suite 1850 Los Angeles, CA 90012 Telephone: 213-202-3950 Fax: 213-202-3961
Washington, DC Metropolitan Area	Washington, DC Metropolitan Area	1990 K Street NW, Suite 510 Washington, DC 20006-1178 Telephone: 202-219-3562/219-3565 Fax: 202-219-3545

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